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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN

# THE SUPREME COURT

2884 F

OF

THE STATE OF MISSOURI.

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BY TRUMAN A. POST,

REPORTER.

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VOL. XLII.

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ST. LOUIS:

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HON. DAVID WAGNER,	}	<i>Judges.</i>
HON. NATHANIEL HOLMES,*		
HON. T. J. C. FAGG,		
O. T. FISHBACK, <i>Clerk at St. Louis.</i>		
N. C. BURCH, <i>Clerk at Jefferson City.</i>		
WILLIAM M. ALBIN, <i>Clerk at St. Joseph.</i>		
TRUMAN A. POST, <i>Reporter.</i>		

\* HOLMES, Judge, resigned after the July term, 1868, and Hon. JAMES BAKER was appointed by the Governor to fill the vacancy for his unexpired term of office.

RULES ADOPTED BY THE COURT AT OCTOBER TERM, 1867.

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No. 1.—Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

No. 2.—All motions for rehearing must be founded on papers showing clearly that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel.

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CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
OCTOBER TERM, 1867, AT ST. LOUIS.

[CONTINUED FROM VOL. XL.]

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HENRY S. TURNER, Respondent, *v.* LEVIN H. BAKER, Appellant.

1. *Instructions*.—Instructions based upon a state of facts not in evidence should not be given.
2. *Instructions—Verdict—Reversal*.—The giving of such instructions, if the jury were thereby manifestly misled in their verdict, will be good ground for the reversal of the cause.

*Appeal from the Circuit Court of St. Louis County.*

The evidence in this case is very voluminous, embracing a long period of years. But as the decision of the case turns simply upon the action of the court below in giving and refusing instructions in reference to the statutory ten years' limitation of real actions, it is useless to state the facts further than they appear in the opinion of the court. Arguments of counsel are also voluminous, but bear almost wholly upon alleged acts of estoppel *in pais*, which are directly denied in the opinion of the court.

*Gantt, Glover & Shepley*, for respondent.

*Hill & Jewett*, for appellant.

HOLMES, Judge, delivered the opinion of the court.

After some study of the whole case, we have come to the conclusion that its determination, as presented on this record, must depend entirely upon the action of the court below in giving and refusing instructions in reference to the ten years' limitation. We shall, therefore, not undertake to review the facts any further than it may be necessary for the purpose of showing the bearing of the points raised and now decided under the statute of limitations.

The suit was an ejectment, commenced on the 11th day of January, 1865. The plaintiff was unable to show any title by deed to any part of the land sued for. His claim of title rested wholly upon an alleged estoppel *in pais*. It is unnecessary to detail the circumstances. It was founded upon acts of ownership and possession of the land, with the acquiescence of the true owner, for a number of years less than the period of the statute bar. This possession, as well as that of the adjoining proprietor on either side, was taken and held under a sheer mistake of the true lines of their respective tracts; and it had wholly ceased somewhere between the years 1842 and 1845. In 1828-9 the ancestors of the defendant had built a fence on what they appear to have supposed to be their western line. About the same time the adjoining proprietor on the west of this possession of the plaintiff's ancestor had erected a fence on what he supposed to be his eastern line. The plaintiff's ancestor supposed his land to lie between them. All parties continued under this mistake until 1845, when the true locations or boundaries were ascertained by accurate survey, made at the instance of the defendant's ancestor. None of them had previously taken the pains to ascertain the true lines by survey. It would appear that the plaintiff's ancestors had knowledge of the correct survey in time to have instituted suit against the adjoining proprietor on



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the west of them, for the possession of the land which really belonged to them, before the statute of limitations had become a complete bar; but no suit was instituted. But soon after the discovery of the mistake, the defendant's ancestors set up their claim to the whole land belonging to them by deed, and, on the 12th day of August, 1845, certain intruders, claiming by a title adverse to both of these parties, having entered and taken actual possession of a larger tract, including these premises, and held the possession adversely against them both, the defendant's ancestors instituted legal proceedings in unlawful detainer against them, and recovered judgment, and were formally put in possession by the sheriff, under a writ of possession, on the 22d of October, 1852. The plaintiff's ancestors made no effort to recover the possession thus lost, though it appears that, in 1856, a tenant of theirs had unlawfully entered upon the possession so held by the other party, and asserted an adverse possession, until he was dispossessed by an action of unlawful detainer at the suit of the other. The defendant and those under whom he claims have held the actual possession in conformity with their title by deed ever since 1852, more than ten years before the commencement of this suit. This may be taken as a brief abstract of the facts material to be noticed here.

A proper instruction was given for the defendant, to the effect that such ten years' adverse possession was a bar to the action; but the jury found a verdict for the plaintiff. If this had been all, it would be difficult to comprehend the verdict; for the evidence appears to have been clear and uncontradicted that such adverse possession had existed ever since 1852.

An explanation of the matter may be found in the instructions which were given for the plaintiff. The first one embodied the facts which the evidence was supposed to prove in relation to the matter of an estoppel *in pais*, and added further that if the jury believed "that the said P. and J. G. Lindell knew and acquiesced in said claim and acts of ownership, and set up no claim of their own to said land west of their fence, prior to 1856, then the said P. and J. G. Lindell, and all those claiming under them, are estopped to claim any land to the west of their



said fence, to the injury of the said J. B. C. Lucas and those claiming under him."

There was no evidence before the jury that would warrant the giving of this instruction; thus assuming, as it did, and in effect telling the jury, that the Lindells had set up no claim to the land prior to 1856, or that upon the evidence that was before them they would be authorized to find that such had been the fact. On the contrary, so far as we can discover, the evidence was clear and decisive, and all one way—that they had not only set up a claim, but had held the actual possession of the land ever since 1852, adversely to everybody. Some argument was made upon an alleged uncertainty in the description of the premises, contained in the proceedings in unlawful detainer, and it was denied that it covered this land. This description was such that, taken together with the identification of calls referred to, it did necessarily cover this land and could properly receive no other construction as a matter of law; and it was not a question to be submitted to a jury beyond the mere identification and location of the calls on the ground. Moreover, the proof was positive that, under the writ, the sheriff put the party into the actual possession of this land. We think this instruction, if not otherwise erroneous in itself, was not warranted by the evidence, and was directly calculated to mislead the jury, and it is apparent to us that the jury were actually misled.

We suppose the tenth, eleventh, and twelfth instructions refused for the defendant, relating to this adverse possession since 1852, were refused upon some like grounds; but for similar reasons we think they should have been given. Looking to the case made on the evidence, we are at a loss to discover any good reason why they should not have been given.

Such being the state of the case, there is no occasion to consider the matter of an estoppel *in pais*. The instructions on both sides appear to have laid the principal stress upon this subject, and many authorities have been cited. We shall not enter upon a discussion of it now. It will be apparent, also, that in the view we have taken of this case, as presented upon this record, the decision in *Lindell v. McLaughlin* (30 Mo. 28) has

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no application to the question now determined, nor is there any occasion that we should remark upon the equities or the hardship on either side.

The judgment will be reversed and the cause remanded. The other judges concur.

Respondent afterward moved the court for a rehearing, on the ground of an alleged misapprehension of facts by the court.

Upon this motion, HOLMES, Judge, delivered the following opinion:

A motion for a rehearing has been filed, insisting that the court had mistaken some of the facts. We have examined again those facts of the record to which the motion refers; but the only mistake which we can allow consists merely in this: that the suit against Hannegan was spoken of as an unlawful detainer, when it appears to have been a petition in ejectment. In the view we take of the case, this difference must be regarded as immaterial. The opposite views of the parties in relation to what land was described in the unlawful detainer against Paynter and others were fully presented in the argument, and our determination of that matter was made upon a careful scrutiny of the whole evidence relating to it. We find nothing in this motion that ought to change our opinion upon it. Whatever ambiguity there might be in the call for the *land of Lucas* on the west is made clear enough by the other calls, the measurement from Eleventh street, and the conclusive proof that the plaintiffs in the suit were put in possession of the whole land up to Finney's fence, by the sheriff, under the writ, and that the occupants attorned to them. It appears, indeed, that Patterson made a lease to Summers on the 20th day of October, 1852; but it clearly appears, also, that he was dispossessed by the sheriff, and compelled to attorn to the Lindells on the 22d day of October following, with all the other tenants in possession.

The possession of the Lindells, so acquired, must be regarded as a lawful possession and a complete disseizin of the claimant under Lucas. The entry of Hannegan upon this possession after-

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ward was unlawful, and it makes no difference whether he was disseized by an unlawful detainer, or quit the premises and abandoned his claim of possession after an ejectment suit. The Lindells regained this possession, and continued to hold the premises until the commencement of this suit, and that was enough. The former possession of Lucas was interrupted by these proceedings after the entry of Paynter and others under Clamorgan, and he cannot be heard to allege a continuous possession after 1845 or 1852. The fact that the claimants under Lucas continued to pay taxes, or supposed that they still had possession, amounts to nothing. And if they were barred by the ten years' limitation, it can make no difference whether the previous possession of Lucas, under his claim of title or his acts of ownership and possession, with the acquiescence of the true owner, had continued for twenty years or not. The claim of twenty years' possession depends upon the assumption that that possession continued until 1856. This assumption cannot be allowed upon the evidence contained in this record. There may be room for ingenious argument, but the merits of the case are too clearly with the defendant to admit a question with us.

The motion must, therefore, be overruled; the other judges concurring.

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THOMAS RUTHERFORD, Respondent, v. OLLY WILLIAMS, Appellant.

1. *Fraud and Deceit—When ground of action for Damages.*—Where a person affirms either what he knows to be false, or what he does not know to be true, to the prejudice of another and for his own gain, he must answer in damages. But general fraudulent conduct, general dishonesty of purpose, or a mere general intention to deceive, amount to nothing unless they are connected with the particular transaction complained of and are shown to be the very ground on which the other party acted and on which the transaction took place, and he must have been actually deceived and defrauded by the representations made. Nor can damages be recovered for the breach of a mere gratuitous promise of favor, or for the consequence of undue confidence or want of prudence in affairs, or for oppressive conduct in foreclosing a mortgage under a power of sale, where the requirements of the contract have been pursued.

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And the damage resulting from the fraud or misconduct must be the direct and immediate consequence of the wrongful act.

2. *Courts of Equity—Relief—When granted.*—Relief by a court of equity is confined to instances of fraud and misrepresentation by one party, touching some matter of interest, contract, security, mortgage, or conveyance, or property of some kind, in respect of which the other party is going to deal on the faith of representations made as to the truth of facts, whereby he is induced to act and deal not only to his own injury and loss, but to the gain of the party who makes the false representation or practices the fraud and deceit. In these cases relief is administered in general for the purpose of annulling the contract, conveyance, or instrument, and subjecting the property so acquired to the purpose of making such representations good; sometimes even to compel the party to make up any deficiency in money, by way of compensation or damages, when the property itself proves insufficient or cannot be reached.
3. *Trial—Issues—What left to a Jury.*—The question of fact whether certain promises or assurances were fraudulently given and were the sole ground of the plaintiff's action, to his injury and loss and to the gain of the defendant, would more properly be submitted to the jury upon an issue directed to that question.
4. *Frauds—Resulting Trusts.*—A party who has acquired property or gained an advantage by means of his fraudulent acts should be declared a trustee for the benefit of him who is injured by such fraud.
5. *Equity—Grounds for Relief.*—To entitle a party to relief in equity, there must be some ground for specific relief beyond a mere claim for damages or for the payment of money.
6. *Equity—Relief—How administered.*—Where there is any fraud touching property, courts of equity will interfere and administer a wholesome justice in favor of innocent persons who are sufferers by the fraud, without fault on their side, by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien.
7. *Courts of Equity—Equities of Redemption.*—Courts of equity will require that the power of disposing of equities of redemption shall be exercised in all fairness and integrity.
8. *Purchaser—Mortgagee—Redemption of Property.*—When the beneficiary or mortgagee becomes himself the purchaser, and there is any fraud touching the sale, he will be considered a mere mortgagee in possession, and the grantor will be entitled to the rights of a mortgagor and be allowed to redeem the property by paying the debt and interest. But the purchaser will be considered the owner of the property until his debt is fully paid.
9. *Fraudulent Sales—Proceeds.*—Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity as a substitution for the original property, and be subjected to the same trust.
10. *Usurious Contracts—Equity.*—Even where the statute makes an usurious contract void, equity will aid the borrower only upon condition of his paying what is *bona fide* and really due—*Ransom v. Hays*, 39 Mo. 445, cited and affirmed.

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Rutherford v. Williams.

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11. *Damages—Jury—Master in Chancery*.—Mere damages for an injury or a breach of a contract must be assessed by a jury at law; but a compensation for beneficial and lasting improvements or profits made may be safely ascertained before a master, or upon an issue directed, at discretion. The case must be one admitting of definite compensation, to be estimated in damages.
12. *Equity—Decree—Account*.—Where there is an equity for relief and an account may properly be taken, though the court cannot decree the plaintiff a recompense in damages for his loss, it may substitute an account of the defendant's profits.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellant.

I. This is not an action of assumpsit, because it is not founded on any agreement either express or implied. Assumpsit lies to recover damage for the non-performance of a parol or simple contract. An action of assumpsit cannot be sustained unless an express agreement is shown, or a state of facts is shown from which an agreement may, under the law, be implied; and in either case a sufficient consideration for the undertaking must be shown—1 Chitty Plead. p. 88; Cutter v. Powell, 2 Sm. Lead. Cases, 13; 11 Wend. 67.

2. It is not a special action on the case. Case lies to recover damages for wrongs not committed with force actual or implied—where the injury is not immediate but consequential—1 Chitty Plead. 134.

3. It is not a case in equity for *an account*. A bill in equity for an account must be founded either on matter of apportionment, contribution, rents and profits, partition, dower, or marshalling of assets, etc.—1 Story Eq. p. 423, §§ 459, 460.

4. It is not a case for relief in equity against fraud, either actual or constructive—1 Story Eq. 197–261.

5. If this be an action *for deceit*, the judgment is erroneous, because damages only can be recovered in an action on the case for deceit.

II. The court below erred in admitting, against the objection of the defendant, parol evidence in respect to the alleged agreement of the defendant not to cause the land in question to be sold under the deed of trust until the return of the plaintiff from Cali-



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fornia. The alleged agreement is *concerning lands*, and there is but one mode of proving such an agreement in this State, and that is *by a writing*.

III. If the action is founded on a parol agreement, no consideration was shown to support it. It is simply *nudum pactum*.

*Gantt & Burnes*, for respondent.

I. The statute of frauds nowhere deprives of his action against a fraudulent trickster a man who has been injured in respect to his title to real estate by reliance on a verbal promise. In the case at bar the wrong and injury effected were accomplished by procuring the absence of the plaintiff from the State of Missouri. The plaintiff is enticed away, and, in his absence, the meditated wrong is accomplished. In what respect does the misconduct of the defendant here differ morally from imprisoning the plaintiff falsely during the time necessary for advertising and selling his land?

II. The promise of Williams was founded upon a proper consideration. There were mutual promises, or, what is the same thing, a promise by Williams on condition that Rutherford would do a certain thing: that is, go to California.

III. It is permissible for a jury in such a case as the present to give interest on a balance struck, of their own discretion. The case of *Dozier v. Jerman*, 30 Mo. 216, establishes this.

IV. The special finding of the facts was proper—Bacon's Abr. and 3 Co. Litt. p. 493 (book III, chap. ix); 3 Thomas Coke, p. 392; *Farwell v. Price*, 30 Mo. 587.

HOLMES, Judge, delivered the opinion of the court.

The petition states in substance that the plaintiff, on the 26th day of March, 1860, obtained a loan of money from the defendant, and secured the same by a principal note for the sum of five thousand five hundred dollars, payable at three years from date, with separate notes for the semi-annual interest, together with a deed of trust on his farm, of the value, as alleged, of twenty-five thousand dollars, containing a power to sell on failure of pay-

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ment; that usurious interest was retained by the defendant out of the sum loaned; that some two years afterward, the interest notes then due not having been paid, and the land being liable, according to the terms of the deed, to be advertised and sold, under the power, to pay the whole indebtedness, the plaintiff had several interviews with the defendant, and informed him of his desire to go overland to California, where he expected to borrow the money necessary to pay the debt from one James L. Jennings, and proposed to go, provided that the defendant would suspend all proceedings for a sale under the deed of trust until he should return, as he expected, in about five months, and that the defendant promised to do so; that the plaintiff, relying upon the promise and good faith of the defendant, departed for California, leaving his family on the place, with a man to take care of the farm; that only some ten days after he was gone, the defendant, in pursuance of a fraudulent intent and design to deceive and entrap him, to his injury, and to obtain the property at a reduced price by a sale under the deed in his absence, caused the trustee to advertise and sell the property, and became himself the purchaser, for the sum of five hundred dollars, on the 22d day of May, 1862; and that, on the 9th day of September, 1863, the defendant sold and conveyed the same, for the sum of ten thousand five hundred dollars, to a *bona fide* purchaser, without notice of any fraud in the sale or of any equity affecting the title. There were allegations, also, of fraudulent conduct and unfairness at the sale, on the part of the defendant, with a purpose of deterring bidders, and in continuation of the preconceived design to defraud, by holding out the idea that he was buying in the property for the benefit of the plaintiff or his family. The prayer was that the defendant might be charged in account with the sum of twenty-five thousand dollars (the value of the farm), together with rent from the day of sale, and be credited with four thousand and six dollars, and ten per cent. interest from the date of the notes, and that the defendant be adjudged to pay the plaintiff the sum found due upon such accounting.

The defendant demurred to the petition, for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer being overruled, an answer was filed substantially



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denying all fraud and deceit, and traversing the main facts on which the plaintiff claimed to be entitled to relief. Motions for a new trial and in arrest of judgment were made and overruled.

The case was submitted to the court, sitting as a jury, for a trial of the issues, and judgment was rendered for the plaintiff, upon a special finding of the facts, stating therein the amount charged, for the value of the farm, at \$15,000, and the credits allowed for debt and interest; and execution was awarded against the defendant for the balance of \$8,087.15.

The petition is certainly not very explicit as to the principles of law or equity on which the action was to be founded, nor very accurate as to the kind of relief to which the plaintiff might be entitled. Evidently it was not intended to state a cause of action at law for damages, whether founded upon a breach of contract or upon fraud and deceit resulting in damages merely. It states a case of equitable jurisdiction, if anything; yet the relief prayed for is not exactly such as a court of equity would grant upon the case stated. It is not easy to say whether the case was tried in the court below as an action at law or as a proceeding in equity; but the relief given was not such as equity could grant. It has been argued here as if it might be either or both. The record exhibits such a blending of law and equity, both as to principles and procedure, that we have had great difficulty in determining what to make of the case. This court has had occasion already, in several cases, to animadvert upon the error of confounding law and equity, not only as to principles, but as to the mode of proceeding, as if no distinction any longer existed.

We are inclined to think the demurrer was properly overruled. The petition could not be treated as an action at law. Whether or no it sufficiently states a case for equitable relief, is a question of some difficulty. It has been held, under the practice act, that the relief sought is an essential part of the petition. It is, at least, not clear that the prayer in this case might not include such relief as could possibly be granted on the case made. As to the case stated in the petition (which is taken to be entirely true on demurrer), our opinion is that it might come within the jurisdiction of a court of equity for granting relief under the head of

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fraud, if a clear case of fraud and deception, as alleged, were proved to the entire satisfaction of the court, or were established by the verdict of a jury—the material facts on which the fraud depends being doubtful upon the evidence.

It has been said by high authority to be a principle of universal law that fraud and damage coupled together will entitle the injured party to relief in any court of justice—*Bacon v. Bronson*, 7 Johns. Ch. R. 194. At law, fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie—*Pasly v. Freeman*, Sm. Lead. C. 55, § 2. There can be no doubt that wherever fraud and deceit resulting in damage can be proved to the satisfaction of the jury, an action at law can be maintained. The cases are numerous to the effect that where a person affirms either what he knows to be false, or what he does not know to be true, to the prejudice of another and for his own gain, he must answer in damages; but independently of any contract no one can be made responsible for representations of this kind unless they be fraudulently made—*Taylor v. Ashton*, 11 Mees. & W. 400; *Stone v. Denny*, 4 Met. 151; *Allen v. Addington*, 7 Wend. 9; 2 Kent's Com. 489, n. b.)

But general fraudulent conduct, general dishonesty of purpose, or a mere general intention to deceive, amount to nothing unless they are connected with the particular transaction, and are shown to be the very ground on which the other party acted, and on which the transaction took place; and he must have been actually deceived and defrauded by the representations made—*Atwood v. Small*, 6 Cl. & Fin. 447. He is himself alone responsible for his own weakness, folly, inattention, want of caution, or imprudence, and for his own necessities and misfortunes. Nor can damages be recovered for the breach of a mere gratuitous promise of favor, or for the consequences of undue confidence or want of prudence in affairs, or for oppressive conduct in foreclosing a mortgage under a power of sale where the requirements of the contract have been pursued; and the damage resulting from the fraud or misconduct must be the direct and immediate consequence of the wrongful act—*Randall v. Hazelton*, 12 Allen, 412.

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The jurisdiction in equity is concurrent, in the exercise of discretion, where it is necessary and fit, and where the law cannot give so speedy and effectual a remedy, though relief may be had at law—*Clifford v. Brooke*, 13 Ves. 131. The cases illustrative of the application of this jurisdiction in equity would seem to show very clearly that the relief is confined to instances of fraud and misrepresentation by one party, touching some matter of interest, contract, security, mortgage, or conveyance, or property of some kind, in respect of which the other party is going to deal on the faith of representations made as to the truth of facts, whereby he is induced to act and deal not only to his own injury and loss, but to the gain of the party who makes the false representations, or practices the fraud and deceit; and in these cases relief is administered in general for the purpose of annulling the contract, conveyance, or instrument, and subjecting the property so acquired to the purpose of making such representations good, but sometimes even to compel the party to make up any deficiency in money, by way of compensation or damages, where the property itself proves insufficient, or cannot be reached; but where there is no special equity as the ground of relief, or there is an adequate and complete remedy at law, and the case is one of fraud and deceit merely, resulting in damages only to the injured party, without any such acquisition of gain to the other party, and not affecting any contract, security, conveyance, or property as such, a court of equity will dismiss the bill and remit the plaintiff to his action at law and a trial by jury—*Evans v. Bicknell*, 6 Ves. 174; *Burrowes v. Locke*, 10 Ves. 470; *Clifford v. Brocke*, 13 Ves. 131; *Bacon v. Bronson*, 7 Johns. Ch. Rep. 194; *Chesterfield v. Jansen*, 2 Ves. Sr. 125; *Neville v. Wilkinson*, 1 Bro. Ch. 543; *Pearson v. Morgan*, 2 Bro. Ch. 389; 1 Story Eq. Jur. §§ 191–203, § 439.

If the proofs in this case had fully sustained the petition, or shown a deliberate scheme of fraud and deceit designed to induce the plaintiff to go away in order that the defendant might get the property at a sacrifice in his absence, in violation of express promises or plighted faith, or upon false representations made, or had clearly established the fact that deceitful inducements had

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been held out to him, or that any such promise or understanding or misrepresentation had been made, and were acted upon by the other as the sole ground of his proceeding, with or without further proof that there had been fraudulent conduct or unfairness at the sale, and that an actual fraud had been accomplished to the injury of the plaintiff, and that by means thereof the defendant had acquired this property, we should certainly have been disposed to sustain this petition and grant such relief as the case made might justify upon the principles upon which the court acts in administering relief in such cases. That the plaintiff has suffered some considerable loss in the actual sacrifice of his property, leaving the debt still unpaid, would appear to be very true; but that this loss has been the result of false representations or promises, or of a fraudulent breach of any positive agreement or of any distinct understanding, or of any deliberate scheme of fraud and deceit, on the part of the defendant, rather than the consequence of his own imprudence, urgent necessities, and inexcusable delay in seeking relief, when effectual relief might have been granted, the evidence is very far from being clear, positive, and entirely satisfactory.

There was evidence that the farm was worth about fifteen thousand dollars, though some of the witnesses stated that it would not have sold in 1862 for more than eight or ten thousand dollars; and the whole indebtedness with interest amounted to some eight or nine thousand dollars. The witness who was present at the first interview says distinctly that the defendant then promised to wait, only on condition that the interest notes were paid up. There was no offer to do this. The defendant states positively that he never at any time promised or engaged to do anything more than this. There is nothing in the testimony of the witness at the other interview that contradicts the truth of this statement. He says nothing on this very essential point. His statements in relation to a parol agreement not to sell under the deed are vague and uncertain as to what was said or promised. The testimony of the plaintiff himself is still more indefinite and unsatisfactory as to any positive understanding or agreement. His statements are at variance with the other witnesses' in several

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important particulars, and are of such a character as to throw great doubt on his credibility.

One of these witnesses says that the plaintiff (at the second interview) informed the defendant of his purpose to go to California, where he expected to get money from his friend to pay the debt, and that the defendant said "he might go," that "he need not be uneasy," and that "nothing would be touched until he came back," but that he (witness) should stay on the place and take care of the farm; but he says, also, that no bargain was made nor any time mentioned when he was to return; nor is he able to state that there was any more distinct promise than this, not to sell under the deed of trust. The plaintiff himself can say no more than that the defendant said "he might go," and that "his family and property should not be molested;" and thereupon, he says, he made his arrangements to go, and went the next day.

He states that no time was agreed on when he was to come back. The defendant appears to have been anxious that, if he went away, some person should be left on the farm to take care of the place in his absence; and it may very well admit of serious doubt whether his expressions may not have been (as he avers) upon condition that the interest should be paid up, and may not have referred as much to the care of the farm as to any distinct agreement on his part not to proceed under the deed of trust, within any given time. Another witness thinks some time was referred to, but cannot say whether it was one or two years. That the defendant should agree not to sell until he came back (an event that might never happen), would be highly improbable; but it might be reasonable to infer that it was understood that he should have time to go and return.

No false representation of any past event, or any cotemporaneous fact, is proved; there was nothing strictly of the nature of a misrepresentation. There was no other proof of any promise or of any definite agreement to refrain from selling under the deed of trust than what is contained in the above expressions; though another witness states that he asked the defendant, in a casual conversation with him, after this suit was begun, if he had



ever made any such promise, and he answered that he might have said something of that kind, but did not think it amounted to anything. This is a vague and unreliable kind of evidence, but it may be taken as some confirmation of the truth of what the other witnesses say, so far as that goes.

It does not appear that the plaintiff went to California at the instance or solicitation of the defendant, nor that he held out any inducements to him to go, otherwise than as above stated. There was no proof of any contract. It is needless to say that, as a contract, it was simply *nudum pactum*. The defendant received no advantage, the plaintiff no detriment, at the instance of the other. It may be said to admit of some doubt whether the plaintiff may not have relied upon the voluntary indulgence of the other, or may not have incautiously suffered himself to be lulled into a feeling of security beyond what was understood or agreed to by the other. The debt was already due by the terms of the instrument. The plaintiff knew that it was in the power of defendant to proceed and sell whatever he pleased, and ordinary prudence might have dictated the propriety of leaving his business in charge of some competent agent, who could have looked after his interests in his absence. It seems not to have been in his power to prevent a sale by payment of the debt or interest; but, though unable to prevent a sale, his personal influence might have been more effectual than the efforts of any agent in procuring bidders, who might have saved the property from sacrifice or made it bring something near the amount of the debt. The property appears to have been worth nearly double the debt, and it must be conceded that his own absence increased the certainty of his loss, and that he was really injured if there was any fraud.

He received information of the sale soon after his arrival in California, and as early as the ensuing month of July. He made no further efforts to get money in California. It appears that he was unable to raise the necessary amount when he got there. No proceeding was instituted for the purpose of having the sale set aside on any ground of fraud or unfairness in the sale, while a resale might have been ordered, or a redemption allowed, on

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satisfactory proof being made; and there was no attempt at any legal proceedings until more than a year after the property had been sold (after the lapse of more than a year from the day of the first sale) and conveyed to the *bona fide* purchaser for full value, without notice of any fraud, and so had been passed away wholly beyond his reach.

The allegations of fraud at the sale are not supported by the proofs. The evidence shows nothing amounting to fraudulent conduct at the sale. One witness states that he urged the defendant to postpone the sale on account of the plaintiff's family, and that the defendant said, in private conversation with him, that he could protect them, but, "not that he would;" and there was no evidence whatever of any attempt to deter him or others from bidding, nor of any unfairness beyond a hard disposition to enforce a sale in a time of depression and under circumstances the most unfavorable for the plaintiff, and so buy in the property for a song, leaving the greater part of the debt still unsatisfied, and thus sinking the plaintiff, perhaps, into utter bankruptcy. On the other hand, there is much ground to infer that the plaintiff was not willing to depart on his journey until he had received some positive assurance from the defendant that his property would not be sold before he should have time to go and return. Failing to get this assurance at the first interview, it would appear that he went again and took with him a friend who could be a witness. It is rendered highly probable that he regarded the expressions used as amounting to such an assurance, and that he acted upon it. If really given to that effect, and without condition, he might justly consider them as equivalent to an express promise not to sell until his return, within the time supposed. In such case the defendant should be presumed to have intended them as such; otherwise, he should have said, distinctly, *No!* to the proposition. If they were used, and not so intended, his conduct was dishonest — was bad faith (*dolus malus*), and a fraud. It was a doctrine of the civil law (cited by Story with approval) that there is ground to charge a man with dishonesty for not having declared his right, when he was under an obligation to do it, by which the other is misled; and it may be deemed



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consent—1 Story Eq. Jur. § 394. The jurisprudence of an enlightened age may be expected to exhibit as high a tone of morals as that of the ancient Romans, at least. The parties here stood in the relation of a mortgagor and mortgagee, and upon this superinduced ground equity in aid of general morals will not suffer a party standing in a situation of which he can avail himself against the other to derive advantage from that circumstance, for it is founded on a breach of confidence; and it is a general principle that, "if a confidence is reposed, and that confidence is abused, a court of equity will grant relief—1 Story Eq. Jur. § 308; Gartside v. Isherwood, 1 Bro. Ch. 560.

But we have great difficulty in saying, upon the whole evidence, such as it is, that a fraud or breach of confidence of this nature ought to be considered by the court (without the verdict of a jury) as satisfactorily established. The question of fact whether such promises or assurances were fraudulently given, and were the sole ground of the plaintiff's action, to his injury and loss and to the gain of the other, would more properly have been submitted to a jury upon an issue directed to that question—Ward v. Turner, 2 Ves. Sr. 431.

In Gartside v. Isherwood, the question of fact whether a confidence has been reposed and abused was sent to a jury, and it was said that "where a matter of fact is necessary to be considered, and there is doubt upon the evidence of the fact, then it is proper to send a neat matter of fact to the decision of a jury." In Evans v. Bickwell, where the Chancellor was not satisfied with the proof of the fraud, it was ordered that the bill be dismissed unless the parties preferred to have an issue made upon the question of fraud, to be tried by a jury. In other cases, the relief prayed was granted only when the fraud on which it depended had been ascertained by the verdict of a jury; and it was said, in Clifford v. Brooke, that a probable fraud was not enough, but that, as at law, the "action must stand upon plain, clear fraud and deception, proved to the satisfaction of the jury"—Haycraft v. Creasy, 2 East. 92.

We are not prepared to say that the fraud and deception here alleged are proved to our satisfaction; but if they were so proved,

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or were established by the verdict of a jury, we are strongly inclined to think that the matter would come within the principles on which the court acts in granting relief under the head of fraud, by declaring a party who has acquired property or gained an advantage by means of his fraudulent acts to be a trustee for the benefit of him who is injured by such fraud—*Brown v. Lynch*, 1 Paige R. 147.

In *Young v. Peachy* (2 Atk. 256), the party had acquired the title, under a parol agreement, to hold it for the benefit of the other. The Chancellor said there was no resulting trust, but that relief would be granted, the proof being clear and satisfactory, by holding him to be a trustee for the benefit of the injured person, under the head of fraud. His conduct, in violation of his promise, being *dolus malus*, equity would compel him to make it good—*Strickland v. Aldridge*, 9 Ves. 516; *Drakeford v. Wilkes*, 3 Atk. 540. In *Boyd v. McLean* (1 Johns. Ch. R. 582), where a resulting trust was decreed upon a parol agreement, clearly proved against the denial of the answer, the Chancellor did not fail to remark upon the danger of admitting such testimony, contrary to the policy of the statute of frauds, unless it were entirely satisfactory. In these cases the proof was clear that a title or interest had been acquired under a parol agreement or understanding that it was to be held for the benefit of the other, and relief was granted by declaring the party a trustee, on the ground that unless he were compelled to make his promise good the statute of frauds would thereby be made the means of accomplishing a fraud. There was a clear breach of confidence, and bad faith, in violation of a parol promise (which was in itself *nudum pactum*), by means of which the party had acquired property which, by the terms of the agreement, should belong to the other. The agreement or understanding which this evidence tends to prove was not in terms to the effect that the defendant would hold the property for the benefit of the plaintiff, nor was there any undertaking to buy in the property at the sale for his benefit. But the agreement, if proved as alleged, related to this property, in which the plaintiff had the interest of a mortgagor, and the defendant that of a mortgagee, and was to the

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effect that he would not direct a sale of that property within a certain time; and in violation of that understanding he directed a sale by which the title was transferred to himself. And it may very well be said that by means of his fraud he has acquired property which, if his promise had been kept, would have continued to belong to the plaintiff, subject only to the debt secured. And if the fraud and deception were satisfactorily established, we think the case would come fully within the principle on which a party will be declared a trustee under the head of fraud.

But there must be something more than a mere violation of a parol agreement, or a breach of contract, for which damages may be recovered at law, or a fraud and deceit resulting in damage only, to entitle the party to relief—*Robertson v. Robertson*, 9 Watts, 32; *Haines v. O'Connor*, 10 Watts, 318. There must be some ground for specific relief beyond a mere claim for damages, or for the payment of money. Relief will not be granted in equity for damages merely, or for the payment of money, where no other kind of relief is required or can be given, and where there is an adequate remedy at law—*Hardwick v. Forbes*, 1 Bibb, 212; *Waters v. Mattingly*, 1 Bibb, 244. In *Clifford v Brooke* (13 Ves. 131), where the case was purely an action for money, the Chancellor said he doubted extremely whether he ought to make such a decree even if the evidence came up to the charges, and, all other ground of relief failing, he refused a decree and left the plaintiff to his action at law. But where there is any fraud touching property, the court will interfere and administer a wholesome justice in favor of innocent persons, who are sufferers by the fraud without fault on their side, and it will be done "by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien"—2 Story Eq. Jur. § 1265.

So far as there is any evidence here of fraud and deception, it concerns the alleged promise not to sell. It cannot be claimed that there was a distinct and positive agreement to that effect, but the circumstances, the expressions used, and the conduct of the parties, were such that a jury might reasonably infer, perhaps, that

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there was in fact such an understanding, which had the effect to mislead the plaintiff, if not expressly intended to procure his absence, whereby the defendant might be enabled to get the property at a reduced price, at a sale enforced contrary to the terms of the agreement; and this, as between them, might justly be said to have been a fraud touching the sale of this property. The sale itself was made by the trustee strictly in pursuance of the power given in the deed, and upon due notice, and there is no proof of any fraud practiced at the sale. The sale would be valid as to an innocent purchaser; its validity is affected only as between these parties. The bad faith of the defendant consists in his directing the trustee to proceed in the exercise of his power to sell, when he had agreed, or led the other to believe, that he would not call the power into requisition in his absence. The injury done to the plaintiff consists in his having been fraudulently induced to go away, whereby he was the less able to attend to his business at home, and suffered loss therein; and it may be said that by means of this fraud and deception the defendant acquired the legal title to the property for a trifling sum, when the plaintiff, if he had been present, might have protected his property from so great a sacrifice.

In *Clarkson v. Creely* (40 Mo. 114), an agent of the grantor in the deed of trust had called upon the beneficiary and informed him that he would be ready to pay the debt secured whenever it should become necessary to proceed under the power to sell; and his agreement to do nothing until he should let the other party know, being distinctly proved, a redemption was allowed on the ground that the acts of the party as clearly operated a fraud for his own benefit, in violation of the agreement, as if it had been a trap expressly set and designed to cheat. It is a general principle that a court of equity will look with a jealous eye upon these harsh modes of disposing of the equity of redemption, and will require that the power shall be exercised in all fairness and integrity—*Goode v. Comfort*, 39 Mo. 313. Where the beneficiary or mortgagee becomes himself the purchaser, and there is any fraud touching the sale, he will be considered as a mere mortgagee in possession, and the grantor will be entitled to the rights of a

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mortgagor, and be allowed to redeem the property by paying the debt and interest; but the purchaser will be considered as the owner of the property until his debt is fully paid—*Goldsmith v. Osborne*, 1 Edw. Ch. 562. As between these parties, the defendant may be regarded as having acquired the title, subject to the right of redemption on a full satisfaction of the notes held by him, with interest, and as being a trustee for the benefit of the plaintiff to this extent and for this purpose.

But he has sold and conveyed the property to an innocent purchaser, and placed it beyond the reach of the plaintiff or of the court for his relief. In such case, the money received by him as the proceeds of the sale will be subjected in his hands to the same trust that the land itself would have been subject to if the title had remained in him. It has been held that where a fraudulent grantee of lands which would have been subject to a trust in his hands has sold the lands and converted them into money, the proceeds of the sale will be considered in equity as a substitute for the original property, and be subjected to the same trust—*Bean v. Smith*, 2 Mas. R. 252.

The same principle may be applied to this case. It goes upon the doctrine of conversion. It does not rest upon any trust arising by agreement or intention of the parties, but upon a breach of trust in selling property which was subject to a trust in the hands of the vendor, and upon so much benefit received; and for this purpose the money is to be considered as the same identical property as the land sold and converted—*Adams' Eq.* 143. He must give a recompense in account to the extent of that value of the land.—*Earl of Oxford's case* (1 Ch. R. 13; 1 Jac. 1), 2 Lead. Cas. in Eq. by W. & T. 504.

It results from this, that the plaintiff would be entitled to relief upon this ground to the extent of the balance remaining of the sum received by the defendant from the sale of the property (which appears to have been ten thousand five hundred dollars), after deducting therefrom the full amount of the notes held by him, and interest thereon up to the date of the sale and conversion; and the plaintiff would be entitled to judgment for that balance, with interest from that date. The defendant must be



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considered as having the right to pay himself out of the money when received, and to apply the proceeds to that purpose; and he remains a trustee for the balance only, for the use of the plaintiff. This is properly a matter of account, and can be definitely ascertained. The defendant would be accountable, also, for rents and profits while the estate remained in his possession.

It appears that the court below refused to allow the defendant, against the demand of the plaintiff, the excess of interest above six per cent., as usurious. An instruction was given to this effect, and the interest notes, as such, were not taken into the calculation. It was decided in *Ransom v. Hays* (39 Mo. 445) that a party who has once paid unlawful interest upon an usurious contract cannot recover it back. Even where the statute makes an usurious contract void, equity will aid the borrower only upon condition of his paying what is *bona fide* and really due, on the maxim that he who asks equity must do equity. The statute here does not make the contract void, nor does it exempt the borrower from paying the usurious interest. So far as it was illegal, the plaintiff is in the situation of a wrong-doer as well as the defendant, and equity will not relieve him—1 Story Eq. Jur. § 64 and § 301. Here the usury is to be considered as having actually been paid. The defendant had the right to pay himself in full out of the money received, and the plaintiff can have no deduction or allowance on account of the usurious interest so paid. In this respect the judgment was erroneous.

The relief administered in this judgment did not proceed upon the equity established as above, but upon the ground that compensation or damages was to be estimated as for the injury and loss sustained by the plaintiff by reason of the defendant's fraud and deceit. An instruction was given to this effect. Evidence was heard as to the value of the farm, and that value as found upon the evidence was taken as the basis of the account and as a measure of damages. This was a total departure from the principles of both jurisdiction and relief, on which the case depended. If there were no other ground of relief, and no other kind of relief to be administered than the payment of money by way of compensation or damages for the injury suffered by the plaintiff, for



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which there would be an adequate remedy at law, the petition would be dismissed. Such damages have no resemblance to compensation in equity—*Todd v. Gee*, 17 Ves. 273; 2 Story Eq. Jur. § 794. In some cases of this kind, where the property itself can be reached for the purpose of relief, but proves insufficient in some certain amount, or where the equity concerns a liquidated demand, or a definitely ascertainable sum which the defendant is liable to make good, he may be decreed to pay such deficiency or such definite sum in money, by way of compensation or damages. In *Bacon v. Bronson* (7 Johns. Ch. R. 194), the defendant had received money which was subject to the equity more than sufficient to pay the plaintiff's demand, and the decree was that if the property itself did not realize the full amount to be paid he should make up the deficiency out of that money. In *Evans v. Bicknell* (6 Ves. 174), there was a special equity (if the fraud had been proved), that the defendant should make good the sum of £300 to the injured party. And in *Burrowes v. Locke* (10 Ves. 470), where there was no special equity, but only a naked claim for damages in money, the bill was dismissed.

The compensation so given is founded not upon an injury or loss suffered by the plaintiff, but upon an account of what the defendant has received, or is, under a special equity, bound to make good, the amount being definitely ascertainable before a master. In *Copper v. Wells* (Saxton R. 17) it was held that mere damages for an injury or a breach of contract must be assessed by a jury at law, but a compensation for beneficial and lasting improvements or profits made may be safely ascertained before a master, or upon an issue directed, at discretion. The case must be one admitting of definite compensation, and not a mere matter of arbitrary damages or a compensation to be estimated in damages—*Adams Eq.* 91, 109. Where there is an equity for relief, and an account may properly be taken, though the court cannot decree the plaintiff a recompense or damages for his loss, it may substitute an account of the defendant's profits—*Adams' Eq.* 219; 2 Story Eq. Jur. § 794, *a*; *White v. Cuddon*, 8 Cl. & Fin. 787-795.

Damages will not be awarded upon a breach of trust merely,

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but only on account of all the profits made, though the party has sustained considerable damage or loss in respect of the property, of the thing itself—*Ludlow v. Greenhouse*, 1 Bligh, N. S. 57-8. Such is the nature of the case here. There are some peculiar cases of specific performance, and particular cases involving an inquiry of damages as incidental and subordinate to the relief to which the party is entitled in equity only, where there is no remedy at all at law in which an issue of *quantum damnificatus* may be directed—*Pratt v. Law*, 9 Cranch, 492-4; *Coster v. Monroe Manufacturing Co.*, 1 Green Chan. R. 467; *Fisher v. Kay*, 2 Bibb, 434; *Wiswall v. McGowan*, 1 Hoff. Ch. 125; *Todd v. Gee*, 17 Ves. 273; 2 Story Eq. Jur. § 798. This is not such a case. There can be nothing like an open assessment of damages, in a court of equity, in a case of this kind. The evidence ascertains no certain amount which the court would be authorized to decree the plaintiff as compensation or damages over and above the balance of the money into which this property was actually converted. And upon the whole case we are inclined to think that this money furnishes the safer criterion of the actual value of the property at that time, and, at any rate, it must be taken as the basis of the account. If the plaintiff had applied for relief in time he might have been allowed, on satisfactory proof, to redeem his property on paying the debt. He must now take what the defendant is accountable for to his use as a trustee, if he can establish his right to anything in a court of equity. In this respect, also, the judgment was erroneous.

It appears by the record that the cause was submitted to the court, sitting as a jury, for a trial of the issue. No particular issues were directed or made up for trial by jury. Such submission of a case in equity can be regarded only as a hearing before the court, upon the pleadings and evidence in the cause. The case is to be considered here in like manner, upon the pleadings and evidence. The instructions are important only as indicating the principles upon which the court acted in giving judgment. We have said that the question of fact whether any agreement, or any expressions amounting to a distinct understanding, to suspend a sale for any given time, was made and acted upon to the injury

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of the plaintiff, and in reference to which the conduct of the defendant was fraudulent in intent or effect, or amounted to bad faith, would more properly have been sent to a jury on a proper issue of fact, upon evidence so doubtful in character. We are not satisfied that it was so clear and decisive as to warrant the finding of the court; it would certainly be more satisfactory if the fact of fraud and deception were established by the verdict of a jury.

After much deliberation we have not been able to find any ground of principle or authority on which the judgment as rendered can be sustained; nor do we see our way clear for rendering such judgment here as should have been given in the court below. We think the ends of justice will be better answered by remanding the cause for a new hearing, in accordance with the principles indicated in this opinion.

Reversed and remanded. The other judges concur.

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ISAAC KEIM and PETER B. GARESCHÉ, Trustees of THOMAS RYAN, Plaintiffs in Error, v. HOME MUTUAL FIRE AND MARINE INSURANCE COMPANY OF ST. LOUIS, Defendants in Error.

1. *Insurance—Application—Contract.*—Where an application for insurance was filed, and on the same day the company proceeded to make out and sign the policy, it ratified the application and its consent was complete. The acceptance of the proposal to insure for the premium offered is the completion of the negotiation.
2. *Insurance—Agreement—Notice of Fire.*—When the company accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the day when the application was filed and the policy made out and signed, and the insured was under no legal or moral obligation to notify the company that the building insured had been burned in the meantime.
3. *Insurance—Voluntary Contract—Suit brought, when.*—The contract of insurance is a voluntary contract, and the insurers have the same right to incorporate and impose the condition that all claims should be forfeited under it unless suit were brought to the next term of court, held sixty days or more after refusal of the company to pay, as they have to impose any other condition. If the insured objects to it, he is under no obligation to conclude the contract; but if he will voluntarily enter into it, he will be held bound thereby.
4. *Insurance—Suit, on what Contract.*—The suit can only be brought on the contract as contained in the policy.

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*Error to St. Louis Circuit Court.*

*Sharp & Broadhead*, for plaintiffs in error.

I. This was a valid and sufficient contract of insurance—Ang. on Fire and Life Ins. §§ 34, 47; Union Mut. Ins. Co. v. Com. Mut. Ins. Co., Law Rep. vol. 18, p. 610; 2 Dutch. 268; 2 Maine, 259; 9 How. 390; 3 Dutch. 645; 29 Barb. S. C. R. 312; 22 Barb. 527.

The defense of fraudulent concealment of the fact of the fire is predicated solely on the alleged transaction of Waterman more than a month after February 9th. The defenses of limitation are predicated solely on the conditions of the extended policy.

So with the defense of the non-payment of the premium, for *the contract* did not require prepayment of the premium.

The contract of insurance sued on cannot be defended by showing a failure to comply with a subsequent one.

*Hill & Jewett*, for defendants in error.

I. The evidence shows that the policy was made out the same day as the *contract* between the parties, and was ready for delivery upon *payment of premium*, and not otherwise. It further shows that Waterman did not consider himself insured until he got the policy, for he got it as soon as he heard of the fire and paid the premium.

II. By the second section of defendants' charter all persons who become *insured* in the company become *members* of the company, and are bound by the charter and by-laws made under it.

III. The evidence does not show any waiver of the terms of the by-laws, even if the secretary had power to waive them, which is denied—*Vide* Baxter v. Chelsea Mut. F. Ins. Co., 1 Allen (Mass.) 294.

IV. Both the charter and conditions of insurance attached to the policy, and made part of it, require the suit to be brought at the next term of any court in the county sitting sixty days after refusal to pay. The facts show that the plaintiffs' action should have been brought to the September term, 1860, of the

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Circuit Court. It was not, and no waiver shown, and therefore the right of action expired—Cray v. Hartford F. Ins. Co., 1 Blatchf. C. Ct. (U. S.) 280; Williams v. Vermont Mut. F. Ins. Co., 20 Vt. 222; Gooden v. Amoskeag F. Ins. Co., 20 N. H. 73; Wilson v. Ætna Ins. Co. of N. Y., 27 Vt. 99; Dutton v. Vermont Mut. F. Ins. Co., 17 Vt. 369; Amesbury v. Bowditch Mut. F. Ins. Co., 6 Gray, 596; Fullam v. N. Y. Union Ins. Co., 7 Gray, 61; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Brown v. Savannah Ins. Co., 24 Ga. 97; 31 Tenn. 448; Carter v. Humboldt F. Ins. Co., Sup. Ct. Iowa, June, 1861; Peoria Mar. and F. Ins. Co. v. Whitehill, 25 Ill. 466.

WAGNER, Judge, delivered the opinion of the court.

This was an action by plaintiffs on an application and policy of insurance issued by defendants to one A. M. Waterman, dated February 9th, 1860, on a building used for storage in Havana, Illinois—loss, if any, made payable to Thomas Ryan's trustees. From the record the facts appear to be that Waterman made application to the secretary of the insurance company, on the 9th of February, 1860, to have the property insured for the sum of \$3,000. The application was accepted by the secretary, and the terms agreed upon, and the policy was to take effect from noon of that day; the policy was made out immediately thereafter and signed, and both the application and policy were permitted to remain in the hands of the defendants.

On the 14th of March, 1860, the building insured was consumed by fire, and after intelligence of that fact was communicated to Waterman he went to the office of the defendants, paid the premium, and obtained the policy. He did not disclose the fact of the building being burned up, when he got the policy, and the insurance company was ignorant of the fact when the same was delivered. As soon as knowledge of the burning came to the possession of the company, it refused to pay the loss and notified the plaintiffs accordingly.

The charter and by-laws of the company, which are in evidence, and which are attached as among the conditions of the policy,



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provide that policies of insurance shall take effect at 12 o'clock, noon, on the day of approval at the office of the company, and shall be binding thereafter, providing the premium has been paid, and not otherwise. Section 14 of the charter, the same provision being incorporated as one of the conditions of insurance, provides that a party dissatisfied with the refusal of the company to pay may bring an action at the next term of court to be held in the county of St. Louis, unless such court shall sit within sixty days after the refusal to pay; and if so, then at the next term of court held in said county after the lapse of sixty days, and not afterward; and unless suit is so brought, all claim shall be forfeited under the policy. The case was submitted to the court without a jury, and on certain declarations of law being given the plaintiffs took a non-suit, and upon a refusal of the court to set the same aside a writ of error was sued out.

It is not necessary to notice the conflict in the testimony of Waterman and Salisbury, the secretary of the company, as to the alleged declarations made by the latter, that when the application was filed and the rate assented to by both parties the transaction was complete, and that Waterman was insured from that day; that there was nothing further to be done. This was a question of fact for the finding of a jury; but from the view the court seems to have taken of the case, it did not enter into its decisions. But there can be no doubt of one thing—that when the company on the same day proceeded to make out and sign the policy, it ratified the application, and its consent was complete. The acceptance of a proposal to insure for the premium offered is the completion of the negotiation.

On the acceptance of the terms proposed, the *aggregatio mentium* takes place; the minds of both parties have met on the subject in the manner contemplated at the time of entering into the negotiation, and the contract becomes binding on each—*Taylor v. The Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Hollock v. Com. Ins. Co.*, 2 Dutch. 268; 3 Dutch. 645.

It is laid down by Angell that, "when the negotiation for insurance is so far completed that nothing remains to be done but to deliver the policy, corresponding with the terms and date of



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application, should a loss occur before the execution of the policy a court of equity would relieve the assured"—Ang. on Fire and Life Ins. § 34; 1 Duer on Ins. p. 66, § 10. There can be no doubt that the defendants would have considered the policy good if the fire had not occurred on the 14th of March, 1860, and that by its terms it would have related back so as to cover the risk from the 9th of February preceding. We can perceive no justice in allowing the company to say that the policy would have been binding and valid from the 9th day of February if no fire had occurred, but that it is void and of no effect because a fire took place on the 14th of March thereafter. When the defendants accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the 9th of February, 1860, and the insured was under no legal or moral obligation to notify the company that the building had been burned—Whittaker v. Farmers' Ins. Co., 29 Barb. 312; 2 Dutch. *supra*. We are inclined to think that the court erred in its declaration of law as relates to the foregoing proposition.

But one of the conditions annexed to the policy declared, as before stated, that all claims should be forfeited under it if suit was not brought to the next term of the court in St. Louis county, unless such court should be held within sixty days after the refusal of the party to pay, and then to the next court thereafter. It is agreed by the parties that the first term of the court before which the case might have been adjudicated was held more than sixty days after the defendants gave notice to the plaintiffs of refusal to pay the demand, and that no suit was brought. Conditions of this kind have been frequently introduced by insurance companies into their policies, and have been almost universally sustained. There are many good reasons, in cases of insurance against fire, why the insurers should introduce such conditions in their policies. The object is merely to compel a speedy determination of the controversy while the proofs and witnesses are accessible and all the matters pertaining to the contest are fresh in the recollection of the parties. They work no injury to the claimants, and may be of great benefit to the insurers. Moreover, the contract of insurance is a voluntary contract, and the

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insurers have the same right to incorporate and impose this as they have any other condition; and if the assured objects to it, he is under no obligations to conclude the contract; but if he will voluntarily enter into it, he will be held bound thereby—Cray v. Hartford Ins. Co., 1 Blatchf. C. Ct. 280; Wilson v. Ætna Ins. Co., 27 Vt. 99; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Amesbury v. Bowditch Ins. Co., 6 Gray, 596; Fullam v. N. Y. Ins. Co. 7 *id.* 61.

The suit can only be brought on the contract as contained in the policy; and one of the conditions of the policy agreed upon voluntarily between the parties operates as a limitation and precludes the plaintiffs from maintaining their action.

Judgment affirmed. The other judges concur.

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WILLIAM S. HARNEY and WIFE, Respondents, v. WILLIAM  
MCGIVERON and MICHAEL O'CONNELL, Appellants.

Judgment affirmed.

*Appeal from St. Louis Circuit Court.*

*R. S. McDonald, Krum & Decker*, for appellants.

*T. T. Gantt*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

This was an action of ejectment for a tract of land lying on the Meramec river, in St. Louis county, and being lot No. 3 allotted to Mary Harney in the partition made of U. S. survey No. 3051. The plaintiffs proved title to the land. The defendants relied upon the statute of limitations. The jury were correctly instructed upon this defense, and the verdict was for the plaintiffs. No error in law is pointed out to us.

The judgment appears to have been given for the right party, and will be affirmed. The other judges concur.

NICHOLAS KARRIGER, Respondent, v. WILLIAM GREB, Appellant.

1. *Practice — Instructions.*—The refusal by the court to pass upon instructions may be taken as a refusal to give them.
2. *Instructions — Evidence.*—There is no error in refusing to give instructions not sustained by any evidence.

*Appeal from St. Louis Circuit Court.*

*T. S. Espy*, for appellant.

The court erred:

I. In declining to pass upon instructions tendered by defendant. The “instructions shall be in writing” — “and shall be given or refused” — R. S. Mo. 677, § 47.

II. In overruling defendant’s motion for a new trial on the ground of after-discovered evidence, an affidavit of defendant accompanying motion.

*Woerner & Kehr*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was a suit for services as a bar-tender. There was a verdict and judgment for the plaintiff for \$165.50. The defense was that the plaintiff was discharged on account of his embezzling the moneys received at the bar, with a counter claim for \$800 so embezzled. The plaintiff and defendant were the only witnesses. The plaintiff positively denied any embezzlement. The defendant could state only that he believed he had embezzled, but nothing more. He could not prove the fact or the amount.

No instructions were given for the plaintiff. Two instructions were asked for by the defendant, which, it appears, the court refused to pass upon. This may be taken as a refusal to give them. But there was no evidence before the jury on which to base them, and there was therefore no error in refusing them.

The defendant moved for a new trial, on the ground of newly

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discovered evidence. He had merely forgotten something when on the stand as a witness. This discovery was no ground for a new trial.

There is no error for which the judgment ought to be reversed. Affirmed. The other judges concur.

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McILVAINE, Plaintiff in Error, v. SMITH *et al.*, Defendants in Error.

1. *Execution—What Estates Vendible—Mere Trusts in Equity not Vendible.* The statute (R. C. 1855, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.
2. *Equity—Debtor and Creditor—Creditor's Bills—Equitable Interest—Trusts.*—A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man cannot own property or money and not own it at the same time. He cannot be permitted to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction of such decree as may be rendered.

*Error to St. Louis Circuit Court.*

This suit was instituted by plaintiff against Garesche as trustee, and Thomas F. Smith as *cestui que trust*, under two deeds made by Charles Gibson to John F. Riffin, original trustee. Under a power of appointment reserved to Smith to change the trustee,

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but not the uses or trusts, Weissinger at first, and subsequently Garesche, had been substituted as trustee.

The petition in substance alleged that Gibson was only nominally the owner, by purchase from Smith, of the realty described in the petition and situate in St. Louis county; that Gibson, by two deeds, one dated the 14th day of April, A. D. 1857, and the other the 26th July, 1857, conveyed this realty to John Riggin, as trustee, for the following uses and trusts:

“That the said Riggin should have and hold the above described premises, and all the appurtenances thereto belonging, unto him and his legal representatives, subject to the following trusts, to-wit: ‘During the life of Thomas Floyd Smith, lieutenant in the United States Army (that is, the defendant), said trustee shall control and manage the said property, and shall rent and lease the same for such periods and upon such terms as shall make the same most productive, and shall receive the rents, issues, and profits of the same; and shall, out of such rents, issues, and profits, pay all taxes, assessments, and other charges upon said property, insurances upon the buildings which are or may be erected thereon, and other expenses; and shall pay over to said Thomas F. Smith, at the end of each quarter of a year during his life, the net product of said property, such payments only to be made to said Thomas F. Smith in person, or upon his order, drawn after each quarter’s income shall have actually accrued, with the express limitation, upon the right of the said Smith to receive such income, that if, at any time during any quarter of the year, and before the income for each quarter becomes due, or at any time whatever before such quarter becomes due, said Thomas F. Smith should, by drawing orders upon such trustee, or in any other manner, attempt to anticipate the income of any quarter, then such income for the quarter or quarters sought to be anticipated shall not be paid to the said Smith or upon his order, but shall become a fund in the hands of the said trustee for the benefit of those entitled to the said property and its profits under this deed, according to the terms hereinafter provided; and the money accruing from the property during the quarter thus to be anticipated by the said Smith shall be loaned out by the said trustee, and shall be accumulated during the life of said Smith, and paid out after his death in the manner hereinafter provided—the design of this whole provision for the benefit of said Thomas F. Smith being to give to the said Thomas F. a right to and interest in the rents, issues, and profits of the said property only after the actual accruing of each quarter’s rent, so



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that before it has actually accrued neither he nor any other person claiming through him shall ever obtain any claim to or interest in any rent of any current quarter; and any attempt to control or anticipate the rent of any quarter before it is actually due shall prevent him or his assigns from ever having any rights or interest in the rents, issues, or profits so attempted to be anticipated.' And this conveyance is made upon this further trust: 'That if the said Thomas F. should, at his death, leave any child or children or their descendants living, then said trustee shall convey said property, and pay over all funds in his hands arising from said property, to such child or children or their descendants, in such shares and proportions as the said Thomas F. may by any writing in the nature of a last will direct; but if he should die without giving such directions, then the same shall be conveyed and paid over to such child or children or their descendants, in the same shares and proportions in which they would take real and personal property left by him to descend to and to be distributed among them by law.' And this conveyance is made upon this further trust: 'That if the said Thomas F. shall at his death leave neither child nor the descendants of any child living, and if he shall by last will and testament direct said trustee to convey the said property or any part thereof, or to pay over any of the money that may be in his hands under this trust, to any person, then said trustee shall convey the same and pay over the funds according to such direction.'"

The deed further provided that if Smith died intestate, without children or their descendants, then the property should be held by the trustee for his brother and sister, subject to similar restrictions as before, and upon their death be conveyed to such persons as would by law be entitled to real estate descending from said Smith as his heirs.

"And this conveyance is upon this further trust: 'That the said Thomas F. Smith during his life, and after his death those who succeed him in said property, shall have the right at any time to serve a written demand upon said trustee to convey such estate in said premises as is hereby vested in said trustee to another trustee, to be named in such demand; and thereupon said trustee shall convey the said property to such new trustee upon the like uses and trusts, and subject to the same limitations and restrictions, herein above set forth—the object of this clause being to confer on said Thomas F. Smith during his life, and after his death those who succeed him as aforesaid in said property, the power to substitute another trustee in place



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of said trustee herein named, but not in any manner whatever to *affect or change the uses and trusts, or to alter, modify, increase, or diminish the limitations, restrictions, and stipulations hereinbefore mentioned.*”

Petition further stated that “said Garesche has been duly substituted for said Riggin as trustee; that Grimsley & Co., on the 20th of November, A. D. 1860, and plaintiff, on the 22d of March, 1861, recovered judgment against said Smith; and that at a sheriff’s sale, under executions issued in pursuance of these judgments, plaintiff, on 3d of May, 1861, acquired the title of Smith to this realty, and it was conveyed to him by deed duly executed, Smith at the time being in the enjoyment of the rents, issues, and profits, as granted to him by these deeds.”

Petition prayed that Garesche “be ordered and decreed by the court to pay and render to the plaintiff, from and after the day of the filing of this petition, and for and during the remainder of the natural life of him, the said Smith, by virtue of the said deeds of trust from said Gibson to said Riggin; and that the said Garesche, or his successors, in the capacity of trustees of said property, be enjoined from paying the same to any party or parties other than the plaintiff or his assignees; that generally the plaintiff herein may be fully subrogated, for and during the remainder of the life of the said Smith, to all the rights and interests which he, the said Smith, had in and to the said deeds from said Gibson to said Riggin, as aforesaid.”

A demurrer to the petition being sustained, the case came up to this court upon writ of error.

*Cline, Jamison & Day*, for plaintiff in error.

I. By the terms of the deed of Gibson and wife to Riggin and his successors in trust, a freehold estate for life in the use of the land in question was created in Smith, with power to appropriate the remainder in fee among his children, if he had any, at his death, and in default of children, then to any person he might see fit; and in default both of children and appointment of Smith, at his death the estate went over to his brother and sister and their children in fee.

II. Thomas F. Smith was entitled, by the terms of said deed, to the use of said estate for life, the legal estate being vested in the trustee; and by virtue of the judgments, executions, levies, sale, and sheriff's deed, all of Smith's interest, both at law and in equity, was sold, transferred, and became vested in the plaintiff, McIlvaine—2 Stor. Eq. p. 974; Green v. Spicer, 1 Russ. & M. 395.

III. Smith's equity in the land and right to the use of the estate were, by the terms of the deed, fully vested in him, and created such an estate and interest in lands as was liable to be seized and sold under judgment and execution against him to satisfy his debts. Our statute will not permit a debtor to enjoy the dominion and use of an estate and property in lands without subjecting such estate as he may have to be sold to pay his debts. Our execution law subjects all a man has *as property* to the payment of his debts—R. C. 1855, § 17, p. 740; Anthony v. Rogers, 17 Mo. 394; Rankin v. Harper, 23 Mo. 579; Dunnica v. Coy, 24 Mo. 169; Brant v. Robertson, 16 Mo. 129; Dick v. Pitchford, 1 Dev. & Batt. Eq. 480; 4 Wend. 462; 4 N. H. 397; Hallett v. Thompson, 5 Paige Ch. R. 585; Whiting v. Whiting, 4 Gray, 236; Brandon v. Robinson, 18 Ves. Jr. 429; Barton v. Briscoe, 1 Jac. 603; Newton v. Reid, 4 Sim. 141; Jackson v. Hobhouse, 2 Meriv. 482; Bradley v. Peixoto, 3 Ves. 325; Graves v. Dolphin, 1 Sim. 66; Shee v. Hale, 13 Ves. 404 and note; Bank of the State v. Forney, 2 Ired. Eq. 181; Snowden v. Dales, 6 Sim. 524.

IV. The forfeiture must be equal to the entire estate; otherwise it is a mere clog on the property and enjoyment of the freehold, which is not tolerated by law—Brown v. Pocock, Coop. Ch. R. 70; Jac R. 603; 18 Ves. 429; 1 Sim. 66; Younghusband v. Gisborne, 10 Jur. 834. The court will see, by inspection of this petition, that no forfeiture is to result (whether the same be void or not) except by the voluntary act of Smith. If this extended to Smith's entire estate in the lands, it would not cover an alienation by operation of law, nor by virtue of judgment, levy, execution, and sale of Smith's interest in the use—Doe on

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Demise of Hutchinson v. Carter, 8 T. R. 57; 1 Sim. 66; 2 Sim. 479.

V. Plaintiff is entitled to a decree on the facts stated in the petition. He acquired the estate vested in Smith at sheriff's sale, by virtue of the deed set out in the petition, and thus became owner of the use and fully seized of the equitable freehold estate for life that was fully vested in Smith by the deed of Gibson and wife to Riggins; and Garesche, by accepting the trust, became clothed with the legal estate for the use of the plaintiff—Barton v. Briscoe, Jac. R. 603; Brandon v. Robinson, 18 Ves. 429; Brandon v. Robinson, 1 Rose, 197; Dick v. Pitchford, 1 Dev. & Batt. Eq. 480; Bank of the State v. Forney, 2 Ired. Eq. 181; Bradley v. Peixoto, 3 Ves. 324; Britton v. Twining, 3 Meriv. 174. Restraints upon alienation of the property of a married woman have been held good, but upon the death of the husband it becomes the absolute property of the widow, and she must enjoy it with the usual incidents of property—Jac. R. 603; 1 Coop. Ch. Cas. 70; 18 Ves. 429; 2 Russ. & M. 197; 1 Rose, 197; 4 Sim. 141; 1 Sim. 66.

The above cases are all to the effect that a clause in a devise against anticipation or alienation, but without forfeiture or gift over of the estate, does not prevent alienation.

VI. This is a provision by Smith in his own behalf, in disguise, to hold this property exempt from his creditors by introducing into the deed of Gibson, back to him, certain clogs which they hoped would be sufficient to place the property of Smith beyond the reach of his debts. Equity can have no difficulty in striking through this entire transaction and in discovering its purpose; and in so doing will treat the deed of Smith to Gibson and Gibson's deed back to Smith as a single instrument, and hold that all clogs of this nature, attached to property, are not only void as being inconsistent with his right to the estate, but also void on the ground of being contrary to the policy of the law. As a general rule, it is contrary to sound public policy to permit a person to have the absolute uncontrolled ownership of property for his own purposes, and to be able, at the same time, to keep it from his honest creditors—Hallett v. Thompson, 5 Paige Ch. R.

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585; Rider v. Mason, 4 Sand. Ch. R. 352; Bridgen v. Gill, 16 Mass. 522.

VII. These forfeitures provided by the deed, on Smith's attempt to anticipate the rent of any given quarter before it falls due, are void on the additional ground that the quarter's rent so attempted to be anticipated becomes an executory use, limited on a contingent remainder in personal chattels, without any one in being to take the chattel at the time of the forfeiture. It is to be held up in the hands of the trustee on accumulation until the death of Smith. Then they are to go to his children, if he have any, or to his appointee among them, or to his appointee generally, etc., although the child who may take this fund by appointment or otherwise may be in *ventre sa mere* at the time of his death. There is no one in being who can take the chattel or who is entitled to its use. It remains in the hands of the trustee, as a mere custodian upon an indefinite accumulation, awaiting the appearance of a future contingent owner. This cannot be permitted under the law governing titles to things personal, and the more especially when it is a mere contrivance to place it beyond the reach of creditors.

VIII. To be vendible under execution, the trust must be a clear and simple one for the benefit of the *debtor only*. If it be, as in this instance, a trust partly for the benefit of the judgment debtor and partly for the benefit of third persons, it is not within the statute regulating executions—See *Ontario Bank v. Root*, 3 Paige, 478; *Doe v. Greenhill*, 4 Barn. & Ald. 684; *Harris v. Booker*, 4 Bing. 96.

*Field, Hamilton & A. J. P. Garesche*, for defendants in error.

I. Smith had no estate or interest in the land that was subject to levy or sale under execution, and, in fact, the sheriff's deed to the plaintiff conveyed nothing.

It is material to observe that the plaintiff does not impute fraud in the execution of the trust deed; nor does he seek to set it aside. On the contrary, he treats the deed as perfectly valid, and

finds his claims on its provisions—*Bogert v. Perry*, 1 Johns. Ch. Cas. 52. Here it was declared that, under a statute not materially differing from our own, no trust estates were subject to execution except such as gave to the *cestui que trust* the whole control of the property, and where the trustee took merely a formal legal title. Chancellor Kent in that case said: "Executed trusts only are subject to be sold on execution. The *cestui que trust* must have the beneficial interest, and the trustee the mere formal legal title"—*Broadwell v. Yantis*, 10 Mo. 402; *Brant v. Robertson*, 16 Mo. 130; *Kelly v. Beers*, 12 Mass. 398, § 388; *Hatfield v. Wallace*, 7 Mo. 114.

All the cases agree that the interest of a debtor, to be subject to execution, must be in the *very land*; and not a mere collateral right, as an encumbrance or charge, or the proceeds of sale to be made by another, or the rents and profits to be taken by a trustee and paid over to the debtor.

Thus, it has always been held that a mortgagee has no interest in the land subject to execution—*Blanchard v. Colburn*, 16 Mass. 345; *Baker v. Copenbarger*, 15 Ills. 103; *Morrow v. Brenizer*, 2 Rawle, 185; *Brewster v. Striker*, 2 Comst. (N. Y.) 19; *Roberts v. Hall*, 35 Vt. 28; *Fisher v. Taylor*, 2 Rawle, 33; *Vaux v. Parke*, 7 Watts & S. 19; *Ashhurst v. Given*, 5 Watts & S. 323; *Paine v. Webster*, 1 Vt. 134.

That choses in action are not subject to be taken in execution, see *Van Ness v. Hyatt*, 13 Peters, 294; *People v. Haskins*, 7 Wend. 463; *Payn v. Beal*, 4 Denio, 405.

II. The deed from Gibson to Riffin creates a valid trust, under limitations and restrictions that are effectual in the law; and the creditors of Smith, becoming such after the date of the trust deed, cannot in equity break up this trust and take from the children the income that the deed expressly declares shall be accumulated for their benefit in the event of any attempt to transfer the same from Smith to another person.

In regard to estates in fee simple, it is an old-established rule in the law that conditions imposed by the grantor in restraint of alienation, or of such enjoyment as is incidental to property, are invalid, as being repugnant to the grant.



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But in respect to estates for life, the rule is otherwise ; and the grantor may provide for a *cesser* of the estate in the event of the bankruptcy or insolvency of the grantee, or of any attempt on his part to alienate the estate. Such provisions are perfectly valid, and will be upheld by the courts, although they impress upon the estate a character quite the opposite of that which they derive from the law.

The English cases establish the rule as just stated — *Dommet v. Bedford*, 6 T. R. 684, S. C. 3 Ves. 149 ; *Cooper v. Wyatt*, 5 Mad. 293.

The English cases, in general, require that the restrictions upon the life tenant, in order to be effectual against creditors, should be accompanied with a gift over, and a gift for life, and a mere declaration that the estate should not be subject to debt would not be sufficient to exclude the rights of creditors. This distinction grows out of the policy of the English bankrupt laws.

The American courts, however, have upholden such settlements where there was a mere declaration in the deed that the life estate should not be subject to debts, unaccompanied with any gift over or provision for *cesser*.

An examination of the provisions of the trust deed in the present case will show, as we think, that the exclusion of the creditors of the life tenant is effectual, even under the narrow rule of the English courts in cases of bankruptcy.

By these provisions the quarterly payments were to be made only to Smith in person, or on his orders after the installments were payable, and any attempt to anticipate the installments, or in any way to control them before they were actually due, was to put an end to the right of Smith or his assignee under the deed, and the whole benefit was to go over to other parties.

These limitations on the life interest of Smith are believed to be perfectly valid, under the rule recognized by all the adjudged cases. But to maintain the suit of the plaintiff, it would be necessary to set aside these limitations, and declare that the creditors of Smith were entitled to take under the deed what the deed expressly declares shall go to his children.

In the American courts it has uniformly been held that a pro-



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vision in instruments creating life interests, to the effect that the property shall not be subject to debts, is valid without any gift over. And this is reasonable; for, in substance, it amounts to no more than a restraint upon a particular form of alienation — Perkins v. Dickinson, 3 Grattan, 335; Fisher v. Taylor, 2 Rawle, 33; Holdship v. Patterson, 7 Watts, 547; White v. White, 30 Vt. 338. In Ashhurst v. Given, and Vaux v. Parke, cited *supra*, it was decided that life interests might be granted to be held without being liable to the claims of creditors.

The rule is the same where the settlement is made by one, of his own property, provided the settler is not indebted at the time of the settlement, or makes provision for the payment of all subsisting debts — Johnston v. Zane, 11 Grattan, 552; Markham v. Guarrant, 4 Leigh, 284; Bryan v. Knickerbocker, 1 Barb. Ch. 409.

For an able exposition of the right of a person out of debt to settle his property, reserving a benefit to himself, and to bind his subsequent creditors, the court is referred to the opinion of Mr. Binney, 1 Wallace, Jr., 119, in note. This opinion was received and adopted by Judge Baldwin, in the Circuit Court of the United States, so far as it applied to the case then before the court.

HOLMES, Judge, delivered the opinion of the court.

The case is submitted upon the questions, first, whether, under the terms of the trust deed, Thomas F. Smith took an estate or interest in the land that was vendible under execution; and second, whether the plaintiff is entitled to any relief upon this bill, or can, by any proceeding in equity, reach the profits of the land during the life of Smith.

There is no allegation of fraud, and the validity of the deed is admitted. It is to be taken as a voluntary conveyance in good faith and upon a good consideration. The deed creates a trust; and the trusts declared are of such a nature as to preclude the execution of a use in Smith as the original grantor under the statute—Guest v. Farley, 19 Mo. 147. It is a trust of which the scheme has been completely declared in the outset, and may

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be considered so far as an executed trust. It is not executory in any sense that would require the aid of a court of equity to prescribe the mode in which the trusts are to be executed; but the execution of the trusts, as declared, would be enforced in equity. It is an express trust, and there is no room to infer a resulting trust by operation of law for the benefit of Thomas F. Smith.

The first question is, whether the trust declared for his benefit creates an equitable estate in the land that could be levied on and sold under execution. By the statute, "all real estate, whereof the defendant, or any person for his use, was seized in law or equity," is subject to sale under execution; and the term real estate includes "all estate and interest in lands, tenements, and hereditaments"—R. C. 1855, p. 740, §§ 17, 73. The statute contemplates an interest or estate in the land, of which the defendant, or the trustee for his use, is seized in law or equity; and when there is no seizin of such an equitable estate, there is no interest in the land which is liable to execution—*Brant v. Robertson*, 16 Mo. 149. It was said in *Broadwell v. Yantis* (10 Mo. 403) that "there must be an interest in land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution," and that "a mere equity, unaccompanied with possession, is not such an interest." The previous decision of this court would seem to warrant a distinction, in reference to the beneficiary, between a vested equitable estate in possession and a mere ground of equitable relief against the trustee, as a simple right to maintain a suit in equity—*Anthony v. Rogers*, 17 Mo. 394; *Rankin v. Harper*, 23 Mo. 579; *Dunnica v. Coy*, 24 Mo. 167. The case of *Broadwell v. Yantis* recognized the authority of the case of *Bogert v. Perry* (1 Johns. Ch. C. 52), which appears to have proceeded upon a distinction of this nature; and it was there said that there must be an equitable title or estate within the purview of the statute of uses, and not a mere equitable interest in the land. It is not very clear what was meant by such an interest, but it may be supposed to mean such an interest only as might furnish a ground for equitable relief against the trustee to enforce the execution of the trust, or "an equitable *chose in action*," as it was said in that case.

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A life estate in land, at common law, was evidenced by the tenant being clothed with the possession under the name of livery of seizin, and he became a freeholder. Trusts are cognizable only in equity, and it was for the reason that the collateral obligations of trusts were not known at law as interests in lands that they took the name of equitable estates. A simple trust supposes the legal estate merely to be vested in the trustee, and that the *cestui que trust* is entitled in equity to the rents and profits, and has power to dispose of the lands, and a right to call upon the trustee to execute a conveyance to him — 2 Washb. Real Prop. 166, 220. Under this deed it is plain that Thomas F. Smith had no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy or to collect the rents; nor could he call upon the trustee to execute any conveyance to himself. His interest, whatever it may have been, does not appear to have had the ordinary incidents of a life estate in land, either at law or in equity. We think it is sufficiently clear that the deed did not vest in him an equitable estate in the land itself, to be enjoyed in possession or otherwise. The levy, sale, and sheriff's deed to the purchaser, under the execution, described the property as "all the right, title, interest, claim, estate, and property, of the said Thomas F. Smith, in and to" the lots mentioned and designated by metes and bounds. We must hold that he had no estate in the land which could pass by that description.

In England, a judgment is made a charge in equity on all lands and equitable interests, and the lien may be enforced by the courts of equity and be made available even by a sale—Adams' Eq. 130, 133. In that way there is less danger of a sacrifice of property in consequence of the difficulty of ascertaining what those interests are; but if all equitable estates and interests were subject to sale under execution, the seller could seldom know what he was selling, nor the purchaser what he was buying, and valuable property would almost inevitably be sacrificed, or the levy and sale would prove utterly futile. Considerations like these may justify us in confining the meaning of the statute to its clear and express terms.

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Many cases from other States have been cited by the defendants' counsel, which may be taken as examples of equitable interests that are not vendible under execution; and some cases also of bounties given by the donors for the maintenance and support of the beneficiary, or of a man and his family, under limitations and restrictions as to the interest conferred that were held to preclude the vesting of any interest or property which could be subjected to the payment of debts even by a judgment creditor's bill—*Johnston v. Zane*, 11 Grattan, 552; *Fisher v. Taylor*, 2 Rawle, 33; *Holdship v. Patterson*, 7 Watts, 547; *Brewster v. Striker*, 2 Comst. 19; *Ashhurst v. Given*, 5 Watts & S. 323; *Markham v. Guerrant*, 4 Leigh, 284. Upon the question whether this interest was subject to levy and sale under execution, they give a strong support to the construction we have given to the statute, but none of them can be regarded as decisive of the point that the interest of Smith, under this deed, was not a vested interest for life in the net product of the rents, issues, and profits arising out of this land, which may be reached by the creditor and applied in equity to the satisfaction of this debt.

This brings us to the second question, whether the plaintiff is entitled to any relief on this bill, or can, by any proceeding in equity, reach this net income during the life of the beneficiary. What interest, then, did he take? By the terms of the deed, during his life the trustee is to control and manage the property, to make loans and receive the rents and profits, to pay all the taxes, charges, insurance, and other expenses, and to pay over to Thomas F. Smith at the end of each quarter, during his life, "the net product of said property," under the restrictions mentioned, with remainders over and a power of appointment as therein expressed. This gave him a vested life estate in this net product, of which the trustee could not deprive him by the exercise of any discretion. He was bound to pay it over to Smith, and it is not given to any other person. So far the case is similar to that of *Green v. Spicer* (1 Russ. & M. 395). Other cases fully support this construction—*Piercy v. Roberts*, 1 Milne & K. 4; *Hallett v. Thompson*, 5 Paige Ch. 583; *Dick v. Pitchford*, 1 Dev. & Batt. Eq. 480; *Bryan v. Knickerbocker*, 1 Barb. Ch. 409. As it was said in *Brandon v.*

Robinson (18 Ves. Jr. 429), it could not be contended that he had no interest until he tendered himself personally to give a receipt, nor that if he refused to give a receipt during his life, and allowed the income to accumulate, it would not be assets for his debts: it would clearly be so—2 Story Eq. Jur. § 974, *a*.

There is no limitation over of this whole interest upon any condition that could determine it, short of the period of his life. The restriction expressed concerns only each quarter's rent as it becomes due, and this is only that if, by any personal act, he shall assign or in any manner attempt to anticipate the income of any quarter, that quarter's income shall go over. The additional clause further shows very clearly that he was to be the owner of this interest in the net product, but not of the income of any quarter until it had accrued; and any attempt to anticipate should prevent him or his assigns from having any interest in the quarter's income so attempted to be anticipated, and in this case it was to go over.

There is no question here of any personal act, or attempt to anticipate, within this restriction: There is no question of any assignment by an act of bankruptcy or an insolvent's schedule. The levy and sale under execution being ineffectual to pass this equitable interest, there is no question of an assignment by the act of the law *in invitum*. The case is really that of a judgment creditor seeking a remedy in equity against this property of the debtor, to subject it to the payment of his debt. The property is of such a nature that it cannot effectually be reached at law; but it is quite a different thing in equity. Here is an attempt of a man, apparently, to tie up his own property under a trust in such manner that himself, as owner, may be enabled to enjoy the income and set his creditors at defiance. This is a thing which the law does not allow. A man cannot own property or money and not own it at the same time. Whatever might be said of the justice or honesty of the thing in point of morals, it is enough that such an arrangement is in contravention of the rules of law and equity. He cannot be permitted to have the beneficial enjoyment of an income of this nature, beyond the reach of his honest debts.



As it was said by Lord Eldon, in a similar case, "he cannot prevent his creditors obtaining any interest in it, though it is his." Nor, when the property is actually given to a man in this manner for life, can the donor take away the incidents of a life estate, nor annex restrictions that shall deprive him of all power of alienation, though he may reduce the interest to an estate short of a life estate by a limitation over—*Brandon v. Robinson*, 18 Ves. 433; *Graves v. Dolphin*, 1 Sim. 66; *Lear v. Leggitt*, 2 Sim. 479; *Shee v. Hale*, 13 Ves. 404; *Piercy v. Roberts*, 1 Milne & K. 4.

An exception may be permitted in favor of a married woman (as to the power of alienation), to the extent that the power is created by a court of equity, in reference to her, a separate property; but no further—*Barton v. Briscoe*, Jac. R. 603. It is further to be observed that this was not a bounty coming from another under rigid restrictions for maintenance only, and excluding all ownership of any interest in the fund, but the beneficiary was himself the donor, with no restrictions which can be admitted to exclude a vested ownership for life. In such case, especially, the court will lean in favor of a vested interest.

The cases show that the proper remedy in such case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of the court are ample to make the remedy effectual—*Bryan v. Knickerbocker*, 1 Barb. Ch. 409; *Dick v. Pitchford*, 1 Dev. & Batt. Eq. 480; *Hallett v. Thompson*, 5 Paige Ch. 583. There would probably be no occasion to take the property out of the hands of the trustee; but he might be enjoined from paying over the quarterly rents to Smith, and directed to pay them over for the satisfaction of such decree as might be rendered. The commencement of suit would create an equitable lien on the rents and profits in the hands of the trustee accrued or to become due; and a master might be directed to take an account, or such other proceedings be had as might seem proper, according to the practice in equity—2 Spen. Eq. Jur. 40, 798.

It will be apparent that the plaintiff was not entitled to relief upon this petition. It was not framed with a view to the relief



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that might be granted as above indicated. The demurrer was properly sustained.

The judgment will therefore be affirmed. The other judges concur.

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JOHN DEERE *et al.*, Respondents, *v.* WM. M. PLANT *et al.*,  
Appellants.

1. *Partnership—Contract.*—A contract made with a party is not binding upon a partnership into which he subsequently enters, unless the firm assent thereto.
2. *Practice—Trials—Evidence—Instructions—Error.*—If there be any competent evidence presented to support an issue, it is error in the court to instruct the jury that the party is not entitled to recover.

*Appeal from St. Louis Circuit Court.*

On motion of the plaintiffs, the court gave the following among other instructions to the jury, to which the defendants, at the time, excepted:

“The court instructs the jury that, upon the evidence in this cause, the defendants are not entitled to recover anything upon the counter-claim secondly set forth in the answer.”

“If the jury find from the evidence that Charles H. Deere was engaged in the manufacture of plows, alone, in 1863, at the time defendants’ alleged contract was made with Vinton, and that Vinton was the agent at that time of Charles H. Deere, individually, and that at that time John Deere was not a partner with Charles H. Deere, you cannot allow defendants anything on their first counter-claim.”

And refused to give the following instructions, among others, asked by the defendants; to which ruling of the court, refusing to instruct, the defendants excepted:

“If the jury believe from the evidence that Charles H. Deere, being engaged in the manufacture of J. Deere’s Moline plow, by himself or his agent, entered into an arrangement with defendants, in 1863, whereby he agreed that he would furnish

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defendants with as many of said plows, from time to time, as defendants might require and order for their trade, upon the consideration that defendants would take hold of said plow and advertise it, and use their influence to introduce it to more general use, and that defendants agreed to do so, and did perform their part of said agreement; and if the jury further believe from the evidence, that, after the making of this agreement, the other plaintiff, John Deere, became interested as a partner with C. H. Deere in the manufacture and sale of said plows; and, with knowledge of the agreement with defendants, did, from time to time, continue to furnish plows to defendants, in pursuance of and upon said agreement; and that defendants, in carrying out said agreement, did continue to expend money, time, and labor in the introduction and sale of said plows, with the knowledge and assent of both said plaintiffs; and if the plaintiffs did, in the fall of 1865, without any reasonable notice to defendants, refuse to fill defendants' order for 661 plows, after defendants had expended money and labor in providing for the sale of them—then defendants are entitled to recover of plaintiffs the damages sustained by them by reason of such refusal to furnish said plows."

*Currier & Strong*, for appellants.

I. The court erred in giving the instruction withdrawing from the consideration of the jury the second ground of counter claim.

II. The court erred in refusing to give the defendants' instruction submitting it to the jury to determine whether or not John Deere had assumed the contract of January 1, 1863.

III. The court virtually decided that no state of facts could make John Deere liable unless he was a partner at the time the contract was made.

All such instructions have been repeatedly condemned as erroneous by this court. (*Clark v. Hammerle*, 27 Mo. 70; *Ridens v. Ridens*, 29 Mo. 470; *Chouquette v. Barada*, 28 Mo. 491; *Chambers v. McGiveron*, 33 Mo. 202; *Turner v. Loler*, 34 Mo. 461; *Moffat v. Conklin*, 35 Mo. 453; *Sawyer v. Han. & St. Jo. R.R. Co.*, 37 Mo. 240; *McKown v. Craig*, 39 Mo. 156.)

*Krum, Decker & Krum*, for respondents.

FAGG, Judge, delivered the opinion of the court.

The respondents sued the appellants in the St. Louis Circuit Court, upon an account stated, for a number of plows sold and delivered to them, and alleged to be worth the sum of nine hundred and seventy-three dollars and fifty cents. The answer admitted the sale and delivery of the plows, but denied that they were worth the amount claimed, and alleged a special contract with the respondents which would entitle them to a deduction from that amount of thirty per cent. It then proceeds to set up separately two distinct counter claims. The first was for damages for the breach of a contract alleged to have been entered into between the parties to the suit in the month of January, 1863, by which the respondents undertook and agreed, upon the terms and conditions therein stated, to furnish all the plows of their manufacture which the appellants might want in their business, and as they might from time to time order, so long as they should comply with the conditions stated and desire to continue such business with the respondents.

The second counter claim was for damages for an alleged breach of a special contract for the delivery of 661 plows bought in the month of November, 1865. To this there was a reply denying the new matter set up by way of counter claim.

The court refused to give a portion of the instructions asked by the defendants; and the points submitted for our consideration arise upon the ruling of the court both as to the declarations of law given for the plaintiffs, and those refused on the part of the defendants. Upon the giving of the instructions, the defendants, by leave of the court, withdrew their counter claims entirely, thus leaving the jury to find simply the value of the plows stated in the account. It was shown by the evidence that in the month of January, 1863, at the time of making the alleged contract, Charles H. Deere was carrying on the business by himself. The court told the jury that if the other plaintiff, John Deere, was not then a member of the firm, the contract was not binding upon

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him. This was not objectionable. It accorded with the plaintiffs' theory of the case. The defendants' theory was that the testimony tended to show that John Deere, after becoming a member of the firm in 1864, had assented to this contract by acting upon it, and was therefore bound by its terms. We think this question ought to have been left to the jury upon a proper direction by the court. It is true the defendants asked an instruction based upon that theory, but it was not simple enough in its form to present accurately to the minds of the jurors the precise question to be determined, and no error was committed in refusing it.

As to the second ground of counter claim, we think it is manifest, upon an examination of the testimony, that the court erred in saying there was none at all tending to prove it. It ought to have been left to the jury to say whether there was a contract for the sale and delivery of the 661 plows, and, if so, what damage the defendants had sustained by the alleged breach of it.

We find nothing improper in the other instructions given for the plaintiffs; but, for the errors herein stated, the judgment of the Circuit Court must be reversed, and the cause remanded for further trial, in accordance with this opinion. The other judges concur.

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WILLIAM W. POWELL, Respondent, v. NORTH MISSOURI RAILROAD  
COMPANY, Appellant.

1. *Railroad Companies—Consolidation.*—Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation.
2. *Railroad Companies—Amalgamation.*—An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation.
3. *Corporation—Dissolution—Effects—Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come.

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4. *Corporation—Transfer—Creditors.*—A corporation cannot give away the effects belonging to it, to the prejudice of creditors. A court of equity will follow the trust fund into the hands of other than *bona fide* creditors and purchasers.

*Appeal from St. Louis Circuit Court.*

This was an action brought by plaintiff to recover of defendant his salary as secretary of the Chariton and Randolph Railroad Company. Testimony was introduced showing the election and services of plaintiff as secretary of that company. The remaining facts pertinent to this cause appear in the opinion of the court.

*Hunton, Moss & Sherzer*, for appellants.

I. A sale by the Chariton and Randolph Railroad to defendant, under the act of Feb. 10, 1864 (Adj. Sess. Acts, 1863-4), in the absence of fraud, vests a complete title to all effects and assets sold and transferred in defendant. (*Vide* act cited; compare act April 2, 1853, Sess. Laws of New York, chap. 76; *Eaton & Hamilton R. R. Co. v. Hunt's estate*, 20 Ind. 463; 25 Ill. 353; *Dwar.* on Stat. 588; compare Ill. Laws of 1861, p. 480.)

II. Without such act the corporation had a right to sell and the other to purchase, the effects and assets not being in the nature of a franchise, both at common law and by virtue of their charter powers; and such a sale, being *bona fide*, passes title. (Coke on Lit., Thom. ed., pp. 213-223; Hobart, 211, *a*; Com. Dig. Franchise, "F.;" Bac. Ab. tit. "Grant, A. B.," "Corporations, E.;" 1 Blackst. Com. 47, 5; 2 Kent's Com. 281; 1 Kyd's Corp. 69, 70-74; Grant on Corp. 98; 3 Rob. 513; Angell & Ames on Corp. pp. 100, 183, 185, §§ 110, 187, 191; Noyes and Commonwealth of Colchester v. Lowten, 1 Ves. & B. 226, 237, 240; Binney's case, 2 Bland, Md., Ch. 142; 3 Rand. 143; 20 Law R. 363; Redf. Rail., 2d ed., 575, 80; Redf. Rail., 3d ed., 514, 516, and notes, p. 523; Sess. Laws, 1851, p. 483; 7 Serg. & R. 320; 4 Johns. Ch. 370; R. C. Mo. 1855, p. 406; Cal. Min. and Manuf. Co. v. Clark, 32 Mo. 305; Adj. Sess. Acts, 1859, p. 414; Chambers v. City of St. Louis, 29 Mo. 576; Gen. Stat. 1865, 341; 1 Story on Cont. 533-589.)



*R. H. Musser*, for respondent.

I. The Legislature cannot be considered to have intended that this vast amount of property should have been transferred to defendant for so trivial a sum as one dollar, to the exclusion of the just claims of creditors.

II. If the Chariton and Randolph Railroad could not sell their property for a dollar and cut off all their creditors, they could not cut off a part of them by a limitation in favor of the grantee that only \$25,000 of their debt should be paid.

III. The grantor and transferee seem, by their own acts, to have considered what they now claim to be a sale as an amalgamation. No trustees were appointed, nor receivers, against whom the plaintiff could have brought his action. Nothing was done after the transfer and acceptance except the fulfillment of the plain stipulations of the deed. If the parties had contemplated other than a transmigration of the corporate powers of the one company into the other, and a complete amalgamation of the one with the other, their acts, if guided by their duties, could not have other than provided for the winding up of the affairs of the grantor in the manner specified and demanded by the public statutes of the State. The act under which the amalgamation was effected cannot have contemplated a bargain and sale. If such had been its purpose, the words "surrender and transfer" would not have been used.

IV. The defendant, under that act, even if it did not amount to an amalgamation, would be a trustee by implication of these assets, and would, in any event, hold them for the benefit of the creditors of the defunct corporation. (Phila., Wil. & Balt. R.R. Co. v. Howard, 13 How. 307; Redf. Rail. 623 *et seq.*; 6 Rail. Cas. 136; Cham. & Pet. Rail. 582; Kean v. Johnson, 1 Stock. Ch. R. 405; 1 Port., Ind., 406.)

HOLMES, Judge, delivered the opinion of the court.

The petition is in the nature of a bill in equity, for an account of the assets of the Chariton and Randolph Railroad Company, in the hands of the defendant. It is alleged that this company, by an agreement with the defendant, and by virtue of the act of



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the General Assembly, approved February 10, 1864, for the consideration of one dollar and of the covenants contained in the instruments of transfer, surrendered and transferred to the defendant their franchises and property, of the value of \$200,000, and that it was agreed that, upon the acceptance of such transfer, the other corporation should cease to exist. There was no allegation of fraud, nor that the transfer was not made for a valuable consideration, nor that the defendant was not a *bona fide* purchaser, nor that there was any trust for the benefit of creditors.

A demurrer to the petition was overruled.

An answer was then filed denying the averments of the petition, as therein stated, and alleging that the defendant, under the act aforesaid, did, on the 14th day of May, 1864, purchase, for a valuable consideration and in good faith, from the said Chariton and Randolph Railroad Company, all their rights, privileges, franchises, and property, but assumed no liability to pay the debts of the company; and it denied the right of the plaintiff to maintain this action.

There was some evidence tending to show that the value of the property sold and conveyed was between fifty and a hundred thousand dollars. The deed of sale and transfer was expressed to be "in consideration of the premises and the agreements herein contained, and of the sum of one dollar." Among the covenants there was one for the payment of \$25,000, for the liquidation of the debts of the company to that amount, and no more, and it was proved that this sum had been paid. Another covenant was to the effect that the defendant would issue certificates of stock in the "West Branch of the North Missouri Railroad Company," to the stockholders in the other corporation, to the amount of the actually paid up stock held by each one, upon a surrender of the old certificates for cancellation. It was further covenanted that the defendant would accept the transfer in pursuance of the act, and agree to undertake the construction of the West Branch Railroad, and proceed at once to the construction and completion thereof, as rapidly as the moneys to be raised by means of the bonds authorized, or from other sources, would enable them to do.

The court gave an instruction, which we may take as indicating the principles upon which the decision was grounded, to the effect that the act of the Legislature did not authorize a sale of the effects of the Chariton and Randolph Railroad Company, but merely an amalgamation and consolidation of the two roads, and that therefore the assets were subject, in the hands of the defendant, to the plaintiff's claim; and judgment was given for the plaintiff for the sum of \$37.35, for which execution was awarded against the property, real and mixed, of the Chariton and Randolph Railroad Company, found in the hands of the defendant.

This corporation was authorized by the act to transfer and assign, by a vote of a majority in interest of the stockholders, all their effects and assets, rights and privileges, and all the work done in the construction of their road, to the North Missouri Railroad Company; and upon such transfer and acceptance the company was "to cease to have a corporate existence," and the road was thenceforth to be styled the "West Branch of the North Missouri Railroad;" their "franchises" were to become "completely vested in the North Missouri Railroad Company," but "the accounts and business of the West Branch" road were to be kept separate and distinct from those of the main line, so that one road should not become or be held liable for the debts of the other. (Adj. Sess. Acts, 1863, pp. 50, 57, § 12.)

The deed certainly transferred and conveyed everything that could be transferred or assigned under this act. This was not a mere amalgamation or consolidation of the two corporations into one. By the very terms of the statute and the deed, the first corporation was extinguished—the second only continued to exist. Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation. (Phila., Wil. & Balt. R.R. Co. v. Howard, 13 How. 333.) An amalgamation implies such a consolidation as to reduce the companies to a common interest. (2 Redf. Rail. 659.) Such was not the case here. One was absolutely extinguished, as was held in a similar case in *Eaton*

and Hamilton R.R. Co. v. Hunt, 20 Ind. 463; State v. Bailey, 16 Ind. 46.

As to what the effect was upon the corporate franchises, we need not inquire very minutely. It may safely be said that such of them as were personal in their nature, and incapable of being transferred to another, were revoked or surrendered, and were extinguished. There is no question here of the power of the Legislature to pass this act, nor of the power of this corporation to do this thing with the consent of all the stockholders, and, for all the purposes of this case, such consent may be presumed. As to the other corporation, whether any franchises were transferred or not, the act conferred upon that company all the additional franchises and powers that were necessary to enable them to accept this transfer and build the West Branch of the North Missouri Railroad. The provision in relation to the keeping of the accounts and business of the branch and the main line separate and distinct, appears to refer to the future operations of the North Missouri Railroad Company, and to the rights and interests of the stockholders therein. This corporation is to be considered as having power to construct a main line and a branch, with two classes of stockholders, in respect of their interest in the corporation. The act of February 16, 1865, to provide for the completion of the North Missouri Railroad and its West Branch, proceeds upon this idea in reference to the application of the funds to be raised by the first mortgage bonds, and may be taken in some measure as a legislative construction of the nature and constitution of this corporation. (Laws of 1865, p. 90.) Whatever it may be, we need go no further now than to say that there is no consolidation of these two corporations into one under the name of the other.

The Chariton and Randolph Railroad Company was not compelled to make this transfer. It was a matter of contract, and it is clear that the conveyance was made upon a valuable consideration, and to a *bona fide* purchaser. It was authorized by law, and it was effectual to convey the property. (Bruffet v. Great West. Railw. Co., 25 Ills. 356.) By the old common law, it seems, a dissolution of the corporation extinguished the debts; but courts of equity in such case will consider the property and effects

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as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come, subject to such a trust. (Ang. Corp. § 779, *a.*) A corporation cannot give away the effects belonging to it, to the prejudice of creditors. (Goodwin v. McGee, 15 Ala. 232; 2 Redf. Rail. 624.) A court of equity will follow the trust fund into the hands of other than *bona fide* creditors and purchasers. (Curran v. Arkansas, 15 How. 307; Bacon v. Robertson, 18 How. 480; Hightower v. Thornton, 8 Ga. 503.) There was no averment and no proof that this defendant held this property otherwise than as a *bona fide* purchaser for a valuable consideration. The judgment of the court below did not proceed upon any equity of this nature, upon the theory that the debtor corporation still existed under the corporate name of the defendant, and that the property which had belonged to it was subject to this demand in this suit. According to the view we have taken of the case, this proceeding was entirely erroneous.

Judgment reversed and the petition dismissed. The other judges concur.

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CITY OF ST. LOUIS, TO THE USE OF ALICE SULLIVAN, ADM'R,  
Respondent, v. JAMES CLEMENS, Jr., Appellant.

*Contract — Assignment.*—Where a contract does not stipulate for the personal services, knowledge, skill, and experience of another, but for work which might be done as well by a third person as by the contractor himself in person, such a contract may be assigned, and the assignee may recover upon it. (Leahy v. Dugdale, 27 Mo. 437, affirmed.)

*Appeal from St. Louis Circuit Court.*

Lewis McGrath and William Cahill entered into a contract with the city of St. Louis for grading, curbing, and macadamizing a certain street in St. Louis adjoining defendant's property. This work having been partly finished, the contract was assigned to plaintiff as administratrix of Walter Sullivan, who completed the

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same and brought her action upon certified tax bills against defendant for the work.

Defendant, in his answer, set up a counter claim for damages caused to his property by reason of the negligent and unskillful manner in which the work was done.

Upon the trial defendant asked the court to give the following instruction, which was refused:

Ninth instruction. "The defendant is entitled to recover of the plaintiff in this action any amount of damages it may appear from the evidence he has sustained, not to exceed the sum of \$2,500, by reason of the manner in which said work was done, or by the want of proper care and caution on the part of the plaintiff in the execution of said work, or which might have been avoided by the use of proper care, diligence, and precaution on the part of said plaintiff, although the work itself may have been done in a skillful and workmanlike manner."

In lieu of which instruction asked by defendant, the court declared the law to be that if the work performed by plaintiff and her assignors, under contract No. 1131, was performed in a skillful and workmanlike manner, according to the terms of said contract and the directions of the city engineer, then the defendant cannot recover of the plaintiff any damages which he may have suffered on account of the making of said street, unless such damages were caused by some act, omission, or negligence, in performance of the work, for which the city of St. Louis would have been responsible in damages to defendant.

*A. M. Gardner*, for appellant.

I. The court erred in admitting the city tax bills as evidence on the part of the plaintiff. These were only admissible under the provisions of the second section of the act supplementary to the act incorporating the city of St. Louis, approved January 16, 1860. (Sess. Acts, 1859-60, p. 383.) The allegations in the petition show that Alice Sullivan was not the contractor. The act referred to only authorizes the issuing of these bills to the contractor, and the suit must be brought for his use alone.

II. Appellant was no party to the contract, nor could he in



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any way control or direct the performance of it. He is made liable without his knowledge, consent, or approval of the work done. The proof shows that the party for whose use this suit is brought had no contract with the city, either verbal or written. This extraordinary privilege of suing an outside party, in no way connected with the contract itself, is granted only to the contractor with the city for the work, to whom the bills shall be delivered, who shall proceed to collect in the name of the city to his own use, etc. No provision whatsoever is made in the act for a sub-contractor, assignee, or any other person except the original himself. The act prescribes to whom the certificates shall (not may) issue, and the engineer had no discretion, and could not assume, to do what the law gave him no authority to do. The pretense was that the contract had been assigned to plaintiff, and that she was substituted for McGrath & Cahill. By what authority, or how, a contract of this peculiar character could be assigned, we are not informed, except that it had the sanction of the city engineer.

III. The contract was executory, and therefore not assignable. (Leahy v. Dugdale, 27 Mo. 437.) The money after it was earned, or the certificates after they were issued, might be assigned, but not the contract itself.

IV. The consent of the city engineer to, or approval of, an assignment of the contract, gave it no more force or validity than if it had been the consent or approval of any private citizen.

V. The ninth instruction asked by appellant and refused by the court was based upon the ruling of this court in the case of The City to the use of McGrath et al. v. Clemens, 36 Mo. 467. The counter claim set up in this suit is identical with that in the case referred to, and which the court therein declared, if established, would have been a complete rebuttal of the plaintiff's *prima facie* case. No matter how skillfully and completely the work itself may have been done, yet if either the city engineer in charge of the work or the contractor under him omitted to do anything which common and ordinary care, skill, or attention, would indicate ought to have been done to prevent injury to third parties, or were so careless or negligent in performing the



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work that damage resulted therefrom unnecessarily to other parties, then the city as plaintiff is liable, and in common justice ought to be. (City of St. Joseph v. Anthony, 30 Mo. 537; Rochester White Lead Co. v. City of Rochester, 3 Comst. N. Y. 463.)

In the declaration of law made by the court (in lieu of the defendant's ninth instruction, refused), it is admitted that the city would be liable for some acts, omissions, and negligences in the performance of the work; but what distinction the court intended to make is not apparent.

*Jecko & Clover*, for respondent.

I. The corporation is not liable to an action for damages consequential upon the paving and grading of a street, directed by the corporate authority in pursuance of an ordinance authorized by its charter, when the agents of the corporation have executed the powers intrusted to them in a skillful and workmanlike manner.

II. Damages occurring to owners of lots on streets, by reason of the establishing or changing the grades of the streets in improving the same, or by reason that the streets are not improved to a level with the established grades by the municipal authorities, are *damnum absque injuria*. (Taylor v. The City of St. Louis, 14 Mo. 20; Radcliff v. Brooklyn, 4 Comst. 195; Hatch v. Vt. Cent. R.R. Co., 25 Vt. 49; Tate v. Ohio & M. R.R. Co., 7 Ind. 479, 482; Commonwealth v. Erie R.R. Co., 27 Penn. 354, 357; Porter v. North Mo. R.R. Co., 33 Mo. 128; Lambor v. The City of St. Louis, 15 Mo. 611; Hoffman v. The City of St. Louis, 15 Mo. 651.)

III. If the work performed by the plaintiff was performed in a skillful and workmanlike manner, according to the terms of the contract and the directions of the city engineer, then the defendant cannot recover of the plaintiff any damages which he may have suffered on account of the making of said street, unless such damages were caused by some act of omission or negligence in performance of the work for which the city of St. Louis would have been responsible in damages to defendant. The facts of

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this case are not very dissimilar from those in the case of *The City of St. Louis to use of George I. Decker, assignee of Ursula Buol, adm'x, v. Wiley Rudolph*, 36 Mo. 465.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon special certified tax bills for grading, curbing, and macadamizing a street in the city. The plaintiff recovered judgment, and the defendant appealed.

The material points may be considered as already determined by the previous decisions of this court in similar cases.

The first ground of error that is relied upon for a reversal was, that the contract with the city was not assignable, and that the plaintiff, as assignee, could not maintain this suit upon the evidence which was offered. This was not one of those contracts which stipulate for the personal services, knowledge, skill, and experience of another. It was for work which might be done as well by a third person as by the contractor himself in person; and it comes within the ruling in *Leahy v. Dugdale*, 27 Mo. 437. The city did not object to the assignment of the contract, nor to the work as done, but recognized the plaintiff as assignee and the person entitled to receive the tax bills. The plaintiff may be allowed to maintain the suit within the decision in *The City v. Rudolph*, 36 Mo. 465. The exceptions to the admissibility of the evidence offered turned upon this point, and were not well taken.

The second error complained of related to the defense that the defendant had sustained damage by reason of the negligent and unskillful manner in which the work was done in respect to the surface drainage. The instructions on this subject were sufficiently in accordance with the previous decisions of this court. (*City v. McGrath*, 36 Mo. 467; *City of St. Joseph v. Anthony*, 30 Mo. 537.) The rule was more correctly stated in the instruction which was given by the court on this point than in that which was refused for the defendant. The other instructions contain no error for which the judgment should be reversed. The jury has passed upon the weight of the evidence, and we have found no reason for interfering with the verdict.

Judgment affirmed. The other judges concur.

RICHARD H. MUSSER, Plaintiff in Error, v. ADAMANTINE  
JOHNSON, Defendant in Error.

1. *Agents of Corporations—Simple Contracts—Agency.*—The conveyance of real property must purport to be made and executed by the corporation acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.
2. *Written Instrument—Ambiguity—Parol Evidence.*—Where the matter is uncertain, on the face of the instrument, whether it was intended to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation.
3. *Seal—Authority—Evidence.*—Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The affixing of the seal is not conclusive evidence of authority; but if dispute arise, the contrary must be shown by the objecting party.

*Error to Circuit Court of St. Louis County.*

*R. H. Musser*, plaintiff in error, *pro se*.

I. The assignment of the claim of the North Missouri Railroad for \$2,400, paid to Abell, Cunningham, Johnson, et al., is sufficient as the deed of the corporation. (31 Mo. 193; 1 Am. Lead. Cas. 453; 5 Wheat. 336.)

II. The use of the word "we" in the assignment shows that the words "President of the North Missouri Railroad Company," attached to his name, are not a description of the person of Isaac H. Sturgeon. (Ang. & Ames on Corp. 159, 2d ed).

III. The assignment was good as a parol contract. (Gen. Stat. 1865, § 6, p. 327; 1 Ad. & El. 600.)

*T. T. Gantt*, for defendant in error.

It will be seen that the main point in this cause is the legal sufficiency of the attempt made by Sturgeon to assign the claim and right of action of the North Missouri Railroad Company against Johnson, Abell, Moberly, and Cunningham, to the plaintiff.

I. The paper produced does not profess to be a transfer of the right and cause of action held by the North Missouri Railroad

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Company against these parties. The paper says "*we assign*," etc., and is signed by Isaac H. Sturgeon, and witnessed by G. W. Blood. If it had been "*I assign*," etc., and was signed and witnessed in the same manner, it would be not more unequivocal. The name of the North Missouri Railroad Company does not occur in the body of the instrument, nor is there any suggestion that the claims and property of that corporation are being transferred.

II. There is a total want of all evidence to show any authority on the part of Mr. Sturgeon to execute the paper for the North Missouri Railroad Company. Such authority could only be conferred by the corporate act of the company. The officers and agents constituted by its charter must have authorized Mr. Sturgeon to sign this transfer, or his attempt to execute it is a nullity. No attempt is made to show this authority.

There are many things in general deserving of attention when a corporation conveys land by deed. First, there must be a consent on the part of the corporate authorities (it being supposed that the corporation possesses the power of alienation, and needs no enabling act for that end) to convey the land, on certain terms and considerations. Second, this consent being gained, there must be a formal act by which it shall be carried into effect. The ceremonies necessary to this formal act are prescribed by § 18, p. 329; Gen. Stat., 1865. This is all. Does the plaintiff in error suppose that this section confers upon the president and secretary an unlimited power of alienating all the land of any corporation? If so, why was a power of sale thought necessary in every charter granted to a municipal corporation possessing a common?

The case of *Smith v. Alexander* (31 Mo. 193) was one in which a person who signed a note was permitted to show, by way of defense to an action on it, that he signed it for a railroad deed, in acknowledgment of a debt due by the railroad, and that the signature by him was only in his representative character as treasurer, and was known to be such by the holder and payee. It is not perceived that any principle which plaintiff in error is concerned in advocating was established by that case.

In the case of the *Mechanics' Bank v. Bank of Columbia* (5

Wheat. 336), all that was decided was that "it is by no means true that the acts of agents derive their validity from professing, on their face, to be done in the exercise of their agency. In respect of a general agent, the liability of a principal depends upon, first, whether the act was done in the exercise, and second, within the limits, of the power delegated"—p. 337.

The president of the North Missouri Railroad Company had no power, under the charter of the company, or by virtue of the general law on the subject of corporations, to sell or assign any rights of the company, or any property to it belonging. Such authority could only be conferred by the directory, acting under its charter. It was not pretended that there was any such action on the part of the directory. The act was not within the power of the president as general agent of the company. (See the Charter, p. 483 *et seq.*; Sess. Acts, 1850-1851, § 5.) "A special agency properly exists when there is a delegation of authority to do a simple act; a general agency properly exists when there is a delegation to do all acts connected with a particular trade, business, or employment." It is a familiar principle that the powers of a general agent are literally those of a special agent strictly construed. (Story on Ag. § 126.) But in the case at bar there is no agency at all, either general or special—no power to assign or convey any property or rights belonging to the North Missouri Railroad Company, and no such assignment was made.

WAGNER, Judge, delivered the opinion of the court.

The petition in this cause set forth that the North Missouri Railroad Company, having agreed to purchase all the assets of the Chariton and Randolph Railroad Company, and being thereto authorized by an act of the General Assembly of Missouri, agreed to pay as a consideration therefor so much of the debts of the said Chariton and Randolph Railroad Company as would not exceed the sum of \$25,000, and appointed, in concert with said Chariton and Randolph Railroad Company, a committee, of which Johnson, the defendant, was one, to audit the demands of the creditors of the said Chariton and Randolph Railroad Company; that one Abell, another of the committee, combining with the defendant



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Johnson and the rest, audited and allowed in favor of said Abell, fraudulently, a sum of twenty-four hundred dollars, which was not in fact due to the said Abell, and that the North Missouri Railroad Company, after paying this demand to the said Abell, assigned to the plaintiff its right to recover it back from the said Abell, Johnson, and the rest of the committee. The action was brought against all the committee, but only Johnson was served with process, and the answer was put in by him alone.

The defendant answered, denying the fraud and combination charged, and denying the assignment of the claim of the North Missouri Railroad Company to the plaintiff. When the cause came on for trial, the plaintiff offered in evidence the following, as evidence of the assignment:

"PRESIDENT'S OFFICE, NORTH MISSOURI RAILROAD COMPANY,  
"JULY 23, 1866. }

"For value received, and without recourse on us, we assign to Richard H. Musser any claim or cause of action we may have against Peter T. Abell, Adamantine Johnson, and John F. Cunningham, on account of any sums of money improperly paid by us to the said Abell, Johnson, and Cunningham, under the false pretense of the said Abell, Johnson, and Cunningham that the same was due to the said Peter T. Abell by virtue of our contract with the Chariton and Randolph Railroad Company, under date 14th of May, 1864, for services rendered as agent and attorney to the last-named corporation; more particularly the sum of twenty-four hundred dollars paid upon the certificate of the said Abell, Cunningham, and Johnson, and William E. Moberly, on or about the twentieth day of September, 1865.

"ISAAC H. STURGEON,

[L. S.]

"Pres. North Mo. R.R. Co.

"Attest, with seal of company attached:

"GEO. H. BLOOD, Sec'y N. M. R.R. Co."

The defendant objected to the introduction of this paper as evidence, for the reason that it did not profess to be the deed of the North Missouri Railroad Company, and that it did not appear that the same was executed by any person to that end authorized by said company. The court sustained the objection, and the plaintiff excepted. The plaintiff then introduced Isaac H. Sturgeon as a witness, and offered to prove by him that he was authorized by the executive committee of the North Missouri Railroad Company to sign the above paper. The defendant objected to this evidence, because the same was incompetent and



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irrelevant. The objection was sustained, and the defendant excepted and took a non-suit, and brings the case up by writ of error.

If a conveyance of real property, purporting to be the conveyance of a corporation made by one authorized to make it for them, be in fact executed by the attorney or agent in his own name as his own deed, it will not be the deed of the corporation, although it was intended to be so and the attorney or agent had full authority to make it so.

The conveyance must purport to be made and executed by the corporation acting by its duly authorized agent. But in matters of simple contract, the rule is not so strict, and an execution of an instrument to bind the corporation will be inferred from the general principles of the law of agency. In the diversified exercise of the duties of an agent, the liability of the principal depends upon the facts that the act was done in the exercise and within the limits of the powers delegated, and especially that it was the intent of the parties that the principal and not the agent should be bound. (*McLaren v. Pennington*, 1 Paige, 102; *Boisgerard v. N. Y. Banking Co.*, 2 Sandf. Ch. 23; *Jenkins v. Morris*, 16 M. & W. 180.)

And where the matter is uncertain on the face of the instrument whether it was intended to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity, and to aid in the interpretation. (*Smith v. Alexander*, 31 Mo. 193; *Shuetz et al. v. Bailey et. al.*, 40 Mo. 69.)

When the instrument bears no marks of an official character upon its face, there is great difficulty in applying the rule; but where marks of an official character not only exist, but actually predominate, the case is shorn of all perplexity. The assignment in this case is headed and dated at the company's official place of transacting business; and although the officers use the plural "we," instead of naming the company, as the contracting party, it sufficiently appears that they were acting officially for the company, and intended to bind it. As strong and irresistible evidence of this, they recite the contract made with the Chariton and Randolph Railroad Company, and that "the same was due by virtue of our

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contract" (meaning unmistakably the North Missouri Railroad Company) with the said Chariton and Randolph Railroad Company, and then sign the paper officially, and attach the seal of the company. There is little room for doubt that it was an official and not an individual act; but if any doubt existed it was competent to remove it by parol testimony.

Another branch of the objection was that it did not appear that the instrument was executed by any person authorized to that end by the company. It does not appear that there was any denial that Sturgeon was the president, and Blood the secretary, or that their signatures were genuine. The seal of the corporation, then, imparted authority. For it is a familiar rule that when the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. (Ang. & Ames on Corp. § 224, and authorities referred to in note 2.) The affixing of the seal is not conclusive evidence of authority; but if dispute arises, the contrary must be shown by the objecting party. (Ang. & Ames, *ib.*; Koehler v. Black River Co., 2 Black., U. S., 715.)

It is unnecessary to notice the objection to Sturgeon's testimony, as we have already substantially disposed of the case as presented by the record.

The judgment will be reversed and the cause remanded. The other judges concur.

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EDWARD McKEON, Respondent, v. THE CITIZENS' RAILWAY  
COMPANY, Appellant.

1. *Supreme Court—Instructions—Evidence.*—It is not the province of the Supreme Court to determine the force or effect of conflicting testimony. But it may consider what the evidence on either side tended to prove, and what not. Instructions should be given or rejected upon the case made by the evidence. Theoretical propositions, for which there is no proper foundation in the evidence, or which suppose a different state of the case from that which is proved, should not be given, for they directly tend to mislead the jury.

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2. *Street Railroads—Statute—Construction.*—The effect and intention of the act concerning street railroads, approved January 16, 1860, is that when the injury to the passenger is occasioned by his getting on or off the car at the forward platform, it shall be presumed as a matter of law that the negligence of the passenger himself contributed to produce the injury.
3. *Damages—Punitive—When Allowed.*—Vindictive and punitive damages can be given, if ever in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done.
4. *Railroad Companies—Responsibility.*—Street railroad companies are not responsible for the crimes of an employee; nor liable for his acts of willful and malicious trespass. They are only answerable for his negligence, or incapacity, or unskillfulness, in the performance of the duties assigned to him.
5. *Damages—Punitive—Civil Actions.*—It is questionable whether damages for punishment can be given in any civil action.

*Appeal from St. Louis Circuit Court*

The following instructions were given on behalf of the plaintiff:  
(The remaining instructions which figure in the case appear in the opinion of the court.)

1st. If you find that the defendant, at the time of the injury to the plaintiff, was a corporation and common carrier, and that plaintiff was a passenger for hire in a car of defendant, and that defendant at the time of the injury had but one agent or servant on said car, and that such servant was on the front platform driving the same, and that plaintiff came on to the front platform to have the car stopped in order to get off the car, and while being on said front platform was thrown overboard or off the car and under its wheels, by the least negligence, want of skill or prudence, on the part of defendant's agent in managing said car, and that plaintiff then and there exercised ordinary care and prudence as a passenger, then the jury should find for plaintiff.

3d. The degree of care required of the plaintiff is ordinary care, which means that degree of care which may reasonably be expected of a person in the plaintiff's situation; and if the plaintiff used ordinary or reasonable care, and suffered an injury from the negligence of the defendant, their agent or servant, then the jury will find for plaintiff.

5th. The jury are to determine as to the credibility of the witnesses, and should give to the evidence of each just such weight as they may think it is entitled to; and if they believe any witness

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in the cause has willfully sworn falsely, they may disregard all of his or her testimony.

7th. The fact that when the injury occurred the plaintiff was getting on or off the front end of the car does not relieve the defendant from liability, if the jury believe from the evidence that his so getting on or off was not from choice on his part, but was required by the misconduct of defendant, or any of its officers, servants, agents, or employees, while running the car, or by any rule adopted by defendant.

9th. Although the jury may believe that plaintiff was guilty of such carelessness or negligence as contributed to and brought about the injury done to him by the front wheel of the car, yet if the jury believe from the evidence that, after the injury by the front wheel was done, the car was stopped, and afterward defendant's driver, negligently, unskillfully, or recklessly, started the car and ran over the plaintiff's leg with the hind wheel, when but for such starting he might have been rescued by the bystanders without any injury from said hind wheel, then the defendant is liable to plaintiff for all damages done to him by the hind wheel.

*Cline, Jamison & Day*, for appellant.

I. The first instruction given for the plaintiff was erroneous and calculated to mislead the jury, and unsupported by any view of the evidence in the case (*Huelsenkamp v. Citizens' R.R. Co.*, 34 Mo. 45.)

II. The sixth instruction given for the plaintiff was also erroneous. Punitive or exemplary damages should never be allowed in a case of this character. The weight of authority establishes the rule to be that, if the damages to the person be committed unintentionally, the award of the jury should be compensatory; but if the injury be willful and intentional, exemplary damages may be allowed. This instruction lays down a different doctrine, and permits the jury in all cases to yield to their prejudices against incorporated companies and saddle upon them ruinous verdicts, upon their interpretation of what is slight or gross negligence. The court should never permit a jury, by instruction in a civil case, to go beyond compensation, unless it found the defendant actuated

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by malice in its legal sense; that is, in the language of the books, "willfulness—a wrongful act done intentionally, without just cause." (Goetz v. Ambs, 27 Mo. 28.)

III. The seventh instruction granted by the court for the plaintiff should not have been given. It contravenes the law, which is absolute, that no liability shall attach from any injury to a passenger in getting off or on the car at the front platform. The instruction states an exception to the law not found in its provisions. (Sess. Acts, 1860, p. 518, § 9; Taylor v. Carondelet, 22 Mo. 105; City of Carondelet v. Lannan, 26 Mo. 461; Huth's Adm'r v. City of Carondelet, 26 Mo. 466.)

IV. The ninth instruction was also incorrect. It admits that the carelessness and misconduct of the plaintiff placed him between the wheels of the car, and yet holds the defendant liable for any injury he may have received by the hind wheel, if the horses were permitted to start through the negligence of the driver, however slight the same may have been. According to all of the cases on this subject, if the party injured by his own negligence or unlawful conduct contributed directly to the injuries complained of, there can be no recovery.

*Hudgins & Son*, for respondent.

I. The record contains no exception or objection to the admission of evidence, and there is no record of the rejection of any; hence the assignment of error by the appellant, for the admission and rejection of evidence, cannot be considered by this court.

II. Common carriers are liable for the least degree of negligence where injury is sustained by a passenger who used ordinary care and prudence at the time to prevent the injury. This is all the first instruction, given by the court at the instance of the respondent, declares. It is an affirmation of a well-established rule of law, fixing the liability of a common carrier toward its passengers, as recently indorsed by this court in the case of *Huel-senkamp v. Citizens' Railway Co.* (37 Mo. 537; *Stokes v. Solton et al.*, 13 Pet. 192; 16 How. 474; 13 Conn. 327; 42 Penn. St. 365; Redf. Rail. § 149; 13 Wend. 611; Ang. Corp. §§ 523, 568, and 570; 21 Conn. 565; 14 How. 486; 32 Penn.



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292; Story on Rail. § 601; 16 Barb. 115-353; 1 Duer, 233; 18 N. Y. 408.)

III. The degree of care required of the plaintiff is ordinary care, which means that degree of care which may be reasonably expected of a person in the plaintiff's situation. And if the plaintiff used ordinary or reasonable care, and suffered an injury from the negligence of the defendant, he is entitled to recover his damages. This is the rule of law as declared in the plaintiff's third instruction and recently indorsed by this court in the case of *Huelsenkamp v. Citizens' Railway Co.* (See, also, 12 Cush. 177; 8 Gray, 79; 17 Barb. 94; 1 E. D. Smith, 36; 4 *id.* 21; Redf. Rail. § 150; 24 Verm. 487; 3 Ohio St. 172; 4 Ohio, 474; 19 Conn. 507; 1 Ad. & El., N. S., 422; 34 Mo. 59.)

IV. The fifth instruction asked by plaintiff was properly given by the court. (34 Mo. 59.)

V. It is a well-settled doctrine of the common law that a jury, in actions of trespass and tort, may inflict exemplary or vindictive damages upon a defendant, having in view the enormity of defendant's conduct rather than compensation to plaintiff. The sixth instruction given for plaintiff affirms this rule by declaring that if the negligence was gross, then the jury might give exemplary damage; otherwise they should only give compensation for actual injury. The instruction was properly given. (*Stempson v. The Railroads, Wallace, Jr.*, R. 170; *Sedg. on Dam.*, 3d ed., 490, 464; *Question Reviewed*, 10 Law Reporter, 49; *Sanford v. Eighth Av. R.R.*, 23 N. Y. 343; 10 N. H. 130; *Conrad v. The Pacific Ins. Co.*, 6 Peters. 272; *Bride v. McLoughlin*, 5 Watts, Penn. R., 375; *Cheltham v. Tillotson*, 3 Johns. 56; 14 Johns. 352; 15 Conn. 225, 267; 3 Scammon, 373; *Tracy v. Swarbuort*, 10 Peters, 81; 42 Penn. St. 365.)

VI. The seventh instruction given for the plaintiff simply negatives the assumption of the respondent that he had a perfect exemption from all liability for the injuries occurring on the front end of the car by virtue of the statute pleaded in bar of this action. If the defendant required the plaintiff to get on or off the front end, then they are liable, notwithstanding the statute of exemption. Or, if plaintiff was required to come on the front



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end by the agent, and was injured there, then they are liable. (Huelsenkamp v. Citizens' Railw. Co., 37 Mo. 537; 32 Barb. 657.)

VII. This court cannot interfere unless the damages are clearly excessive, even in a case where exemplary damages are inadmissible. (2 W. Black, 942; 3 Burr. 184; 4 T. R. 651; 5 Cow. R. 106; Graham N. T. 410 *et seq.*; 5 Mason, 497.)

VIII. Removing from the cars of defendant, passengers who fail to pay their fare, is within the scope of the general employ of the agent of defendant, and they are liable for his wrongful acts in using unnecessary force and violence. (42 Penn. St. 369; 30 Law J. Exch. 189; 21 How. 202; 4 Gray 465; 6 Jurist, N. S., Pt. 2, p. 143.)

HOLMES, Judge, delivered the opinion of the court.

This was an action for damages for an injury done to a passenger by reason of the carelessness and negligence of the driver of the car. The answer denied the material averments of the petition, and alleged that the plaintiff's injuries were the result of his own negligence. It set up a defense also under the statute entitled "An act concerning street railroads in the city of St. Louis," approved January 16, 1860. This act provided that "said railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car."

We have examined the evidence in order to see upon what basis of facts the instructions were given or refused. It is not our province to weigh evidence or to determine the force or effect of conflicting testimony, but we may consider what the evidence on either side tended to prove, and what not. Instructions should be given or refused upon the case made by the evidence. Theoretical propositions, for which there is no proper foundation in the evidence, or which suppose a different state of the case from that which is proved, should not be given, for they directly tend to mislead the jury.

The case made upon the evidence contained in the record, so far as it is necessary to be stated for the purpose of determining whether there was any error in giving or refusing instructions,

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was substantially this: (That the driver having gone to supper, the conductor was acting as driver in his absence; that the plaintiff, a passenger, being intoxicated and scarcely knowing what he was about, arose from his seat when the car drew near to his place of residence, and went to the forward platform of the car, where he had left his tools, threw the tools off the car, and attempted himself to get off, before the driver had brought the car to a stop; that the driver seized hold of him with one hand to prevent him from jumping or falling off while the car was in motion; that a scuffle ensued, the driver making every effort to prevent him from falling off, with one hand, while with the other he was holding down the brakes, some others also interfering; and that, in spite of all the driver could do, the man fell over the dashboard and under the wheels just before the car came to a stop; that the forward wheel injured his arm, and that before he was extricated the horses started and the next wheel went over his leg.)

The mass and general tenor of the whole evidence would seem to show clearly enough that the horses were scared in the noise and confusion, and started forward without fault of the driver, while the expressions used by some of the plaintiff's witnesses might imply, but do not distinctly say, that the driver of his own motion started the horses and drove on. My own impression would be that the jury could not have believed, upon the evidence, that the driver intentionally and willfully drove on while the man was under the car, at the risk of killing him, much less with any intent to do him harm. But the instructions will be considered upon the theory that there was some evidence before the jury from which they might be warranted in inferring negligence on the part of the driver in allowing the horses to start forward.

The effect and intention of the statute would seem to be that where the injury to the passenger is occasioned by his getting off or on the car at the forward platform, it shall be presumed, as a matter of law, that the negligence of the passenger himself contributed to produce the accident and injury, and it is therefore declared that the company shall not be liable in such case. A like construction was given to a somewhat similar statute provision in the case of *Higgins v. Hann. & St. Jo. R.R. Co.*, 36 Mo.

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436. It is not supposed that this presumption would preclude the other party from showing that the injury was not occasioned by any such contributory negligence at all, but by some negligence in the officers or agents of the company, wholly independent of the fact that the passenger had attempted to get off or on the car on the front platform. If the accident and injury were occasioned by reason of such attempt to get on or off the car at the front end, the defendant, under the statute, would be relieved from liability, though guilty of some negligence, and without reference to the question whether it was in fact the negligence of the one party or the other which actually caused or produced the injury. But again, if the injury were occasioned by the negligence of the driver, in intentionally starting the horses, or in carelessly allowing them to start forward, while the man was lying underneath the car, that would be an independent act of negligence for which the company might be liable; it would raise a question of the capacity, competency, and fitness of the servant for such a place.

The evidence clearly shows that the man was intoxicated, and that he imprudently attempted and persisted in his attempt to get off the car while it was in motion, and that the driver did all he could to prevent him and to save him from falling under the wheels. We find nothing in the evidence that could properly be taken as tending to prove that the driver intentionally and willfully or maliciously started the horses forward. The most that can fairly be claimed for it would be that some vague expressions might tend to show negligence in the driver, or a want of that extraordinary care which the state of things would require in a prudent and careful man under like circumstances.

The first and third instructions given for the plaintiff, besides that they assumed some facts not warranted by the evidence, were directly in contravention of the statute as above explained. The seventh was erroneous, for the reason that there was nothing in the evidence that could justify such an instruction, and it tended to mislead the jury. To the ninth instruction we see no objection.

The first instruction refused for the defendant reads as follows:

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"If the jury find that the injuries complained of were occasioned by plaintiff while attempting to get off of the front or forward end of the defendant's car, then they will find for the defendant." This proposition recognized the statute presumption in relation to contributory negligence, and embraced the whole issue on behalf of the defendant; and we think it should have been given. The instructions which were given for the defendant cannot be said to have covered the same ground.

The refusal of the other instructions asked for the defendant, considered with those which were given for him, would not amount to any error by which he could have been seriously prejudiced, and some of them were objectionable as placing the whole issue on particular facts.

The sixth instruction given for the plaintiff requires a particular notice. It told the jury, first, that if the negligence or misconduct were not gross, they would assess the damages at a reasonable compensation for the injury, suffering, and expenses, caused by such negligence; but, second, that if the negligence were gross, then they would find "liberal or exemplary damages, in their discretion, beyond the actual injury sustained by the plaintiff, for the sake of the example and punishment for such gross negligence." This second proposition carries the idea of exemplary damages entirely beyond a full recompense for the injury sustained, and authorizes vindictive and punitive damages. This goes further than the law ever allows in a case of this kind. Such damages certainly can be given, if ever in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done. (*Goetz v. Ambs*, 27 Mo. 33.) This instruction awards them upon gross negligence merely. In the case of *Goetz v. Ambs*, such damages were spoken of as exemplary damages. In *Freidenheit v. Edmondson*, 36 Mo. 226, we had occasion to consider what was properly meant by exemplary damages. It was a case of willful injury, and exemplary damages were defined to be merely a round compensation or an adequate recompense for the injury sustained. Such damages may serve for an example to others in like cases, and may so far be called exemplary. The question of punitive damages was not necessarily involved

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in that case; but a distinct intimation was given that the principle of administering punishment belonged rather to criminal than to civil jurisprudence. If the conduct of this driver were willful and malicious, with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offense; but his employer was not responsible for his crimes, nor liable for his acts of willful and malicious trespass. The company was answerable only for his negligence, or his incapacity or unskillfulness in the performance of the duties assigned to him. In such case we have no hesitation in saying that punitive damages, or any damages beyond a full compensation for the injury sustained, cannot be allowed. It is, at least, very questionable, upon principle and authority, whether damages for punishment can be given in any civil action. My own opinion is that they cannot. But, independently of this question, the instruction was clearly erroneous.

The case not having been fairly tried under instructions which can be regarded as correct, the judgment will be reversed and the case remanded. The other judges concur.

I dissent from so much of the above opinion as refers to the question of damages.

DAVID WAGNER.

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LEVERING *et al.*, Appellants, *v.* UNION TRANSPORTATION AND INSURANCE Co., Respondent.

1. *Contracts — Bailments — Carriers — Exceptions to Liabilities — Practice.*—

In an action against a carrier, the plaintiff is not bound to show negligence on the part of the carrier, in the first instance; all that is necessary to charge the carrier is to prove the delivery of the goods to him to be carried, and the burden of accounting for them is thrown upon him; and if he wishes to exonerate himself from liability, he must show either a safe delivery of the goods, or prove that the loss occurred by one of the causes excepted in his undertaking.

2. *Contracts — Bailments — Carriers — Exceptions to Liabilities.*—A carrier

may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by mistake or accident; but he cannot exempt himself from losses caused by a neglect of that degree of diligence which the law casts upon



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him or his character of bailee. The obligation of the carrier does not originate in contract, but is a duty the law imposes upon him in consideration of the nature of his employment; and if he assumes the calling, he has no power over the duties which the law annexes to that calling. It is the duty of a common carrier to receive whatever goods are offered to him for transportation in the usual course of his employment, and he cannot vary his liability by inserting conditions in his acceptance of goods. To have this effect there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, cannot be undermined and frustrated by the design and circumvention of artfully prepared printed receipts thrust upon the public, without the opportunity of fair assent, in the press and hurry of railroad travel.

3. *Contracts — Bailments — Common Carriers — What Care required.* — The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the common carrier, although he may by his contract restrict his liability as insurer, is held to that different and higher degree of diligence commensurate with the duties he assumes.

*Appeal from St. Louis Circuit Court.*

The following instructions, asked for by defendant, were refused, viz :

2. If the jury believe from the evidence that the cotton in controversy was shipped under the bill of lading read in evidence, then the plaintiffs were bound by the conditions expressed in said bill of lading, and cannot recover unless they prove affirmatively, to the satisfaction of the jury, that the loss occurred through the gross negligence of the defendant or its agents.

3. If the jury shall find that the defendant received the cotton in question, to be forwarded by defendant over railroads owned by other parties and companies, and that the plaintiffs knew the manner in which the said cotton was to be forwarded, then the defendant is not liable as an insurer, and can only be held liable for gross negligence.

4. If the jury believe from the evidence that the cotton in question was, while in the possession of the defendant, lost or destroyed by fire, then the plaintiffs are not entitled to recover.

5. If the jury believe from the evidence that the cotton in question was lost by fire, then the defendant is not liable in this suit, unless the plaintiffs have proven to the satisfaction of the jury that the loss was occasioned by the negligence of the defendant.

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6. There is no evidence in this case that the cotton in question was lost or destroyed by the negligence or carelessness of the defendant or its agents.

The following instruction was given by the court, of its own motion :

If the cotton in question was lost by fire, while in defendant's possession, on a railroad train, then the defendant is not liable, if the persons in charge of the train took all reasonable care and observed all reasonable precaution in the management and conduct of the train, and if the car in which the cotton was burned was reasonably tight and suitable for the transportation of such freight.

*Hunton, Moss & Sherzer*, for appellants.

I. Though a common carrier, as to certain excepted risks in his bill of lading, may limit his common law liability, he is still held, in respect to those risks, to the exercise of due diligence and care: his contract does not extend to exemption from liability for negligence. In this respect his common law liability still exists. (*Swindler v. Hilliard*, 2 Rich. 286; *Baker v. H. C. Brinson*, 9 *id.* 201; *Singleton v. Hilliard & Brooks*, 1 Strob. 203; *Berry et al. v. Cooper et al.*, 28 Geo. 543; *Graham & Co. v. Davis & Co.*, 4 Ohio S. R. 378-9; *Davidson v. Graham et al.*, 2 Ohio S. R. 131, 141-2; *Sto. on Bail.* 574, § 571; *Ang. on Carr.* 166, § 169, n. 3; *Dale v. Hall*, 1 Wils. 281; 3 Kent's Com. 300, and notes.)

II. The court decided aright on the burden of proof. See case cited. (2 Green. Ev. § 219; *Whitesides v. Russell*, 8 Watts & Serg. 49; 2 Ohio S. R. 141-2; *Slocum v. Fairchild*, 7 Hill, N. Y., 296-7.)

III. Plaintiffs' second instruction should have been given — the bill of lading in land transportation being merely a receipt, and not binding as a contract upon plaintiffs unless signed by them or expressly agreed to. (2 Ld. Ray. 912; *Bouv. Dict. tit. Bill of Lading*; *Bryans v. Hix*, 4 M. & W. 785-788; *Pardington v. South Wales R. R. Co.*, 1 Hurl. & Nor. 393; *Simons v. Gt. West. Railw.*, 1 Hurl. & Nor. 393; *Simons v. Gt. West. Railw.*, 18 C. B. 805; *White v. Gt. West. Railw. Co.*, 2 C. B., N. S., 7;

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Smith's Mer. Law. 376; Fish v. Chapman & Ross, 2 Kelley, Geo., 349; Chouteaux v. Leech & Co., 18 Penn. 233.)

In any event, it was no express agreement as to its conditions, the common carrier not being able so to limit his common law liability. (Gould v. Hill, 2 Hill, N. Y., 623; Cole v. Godwin et al., 19 Wend. 251-262; Fish v. Chapman et al., 2 Kelley, Geo., 358.) It is only by express agreement that this liability can be controlled. (Hallister v. Hollen, 19 Wend. 234; Cole v. Goodwin et al., 19 Wend. 251; Fish v. Chapman et al., 2 Kelley, Geo., 358; N. J. Trans. Co. v. The Merchants' Bank, 6 How. 366; Gould v. Hill, 2 Hill, N. Y., 623; Camden & Amboy Trans. Co. v. Belknap, 21 Wend. 355; 3 Hill, 9-20; 10 Met. 472.)

*Knox, and Smith & Knight*, for respondent.

I. The Union Transportation Company had a right to contract against liabilities occurring from "loss by fire." (Redf. on Rail. § 132; Edw. on Bail. 468 and following; Sto. on Bail. § 554.)

II. The appellants, having alleged in their petition a loss not within any of the excepted perils, were not entitled to a verdict if the jury found the loss to have been occasioned "by fire."

WAGNER, Judge, delivered the opinion of the court.

This suit was brought by plaintiffs to recover the value of twenty-six bales of cotton, which defendant had received to transport from East St. Louis to New York. The cotton was destroyed by fire in the course of its transit, in one of defendant's railway cars. At the time the cotton was delivered to defendant, it gave a receipt for the same, in the nature of a bill of lading, which had stamped across its face the words, "At owners' risk of fire," and also a like reservation in regard to loss by fire inserted in one of the conditions embodied in the instrument.

The plaintiffs claim damages to the amount of the value of the cotton, and allege that the loss was occasioned by the negligence and carelessness of the defendant in failing to furnish suitable cars for its transportation. The jury, acting under instructions of the court, found a verdict for the defendant, on which judg-

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ment was rendered. There is nothing in the evidence requiring comment; and if the law was correctly and properly declared, there is nothing to justify an interference. The plaintiffs were not bound to show negligence on the part of the carrier, in the first instance. All that is necessary to charge a carrier is to prove the delivery of the thing to him to be carried, and the burden of accounting for it is thrown upon him; and if he wishes to exonerate himself from liability, he must either show the safe delivery of the goods, or prove that the loss occurred by one of the causes excepted in his undertaking. (*Tumey v. Wilson*, 7 Yerger, 340; *Berry v. Cooper*, 28 Geo. 543; *Cameron v. Rich*, 4 Strob. 168.) It is universally admitted that the carrier is always liable for injuries resulting from his own negligence, which will include defects in the means of transportation provided by him; and his liabilities will extend to agencies which the violence of nature causes in consequence of his negligence or defective means. In general, he has been held to be an insurer of the safety of the goods intrusted to his care, and can only be exempted from perils occasioned by the act of God and the public enemy. For a long time it was denied by most respectable and eminent authorities that a carrier could release himself from the stringent responsibility imposed upon him by the common law, or destroy the character of insurer which he held toward the person employing him either by notice or contract. But the opinion now seems to prevail that he may stipulate for a limitation of his responsibility. (*Parsons v. Monteith*, 13 Barb. 353; *Moore v. Evans*, 14 *id.* 524; *Dorr v. The New Jersey Steam Nav. Co.*, 11 N. Y. 486; *New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. 382; *York Company v. Central Railroad*, 3 Wallace, 107; *Camden v. Beelduff*, 16 Penn. St. 67; *Davidson v. Graham*, 2 Ohio St. 131; *Western Transportation Co. v. Newhall*, 29 Ill. 466.) But although he may thus restrict his liability, so far as he is an insurer against losses by mistake or accident, he cannot exempt himself from losses caused by a neglect of that degree of negligence which the law casts upon him in his character of bailee.

As the exception is an innovation on the principles of law, and

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introduced exclusively for the benefit of the carrier, the construction must be made most strongly against him.

In *Atwood v. Reliance Transportation Co.*, 9 Watts, 88, in relation to the restriction in a contract by a carrier, Mr. Chief Justice Gibson said: "Though it is, perhaps, too late to say that a carrier may not accept his charge on special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them;" and the authorities are all to the same effect. The peculiar duty and high responsibility which has been imposed upon the common carrier arises from the public character of his employment, the extensive control he exercises over the property of others, and the facilities which he usually has for securing impunity for an abuse of his trust. (2 Kent's Com. 597.) It is the imperative duty of a common carrier to receive whatsoever goods are offered to him for transportation in the usual course of his employment, and he takes them with all the responsibilities attached by law to his calling or employment. He cannot vary his liability by inserting conditions in his acceptance of goods; but to have this effect of exonerating him, there must be a special contract assented to by the shipper.

The argument in favor of the right of the carrier to vary his liability, by introducing conditions into his acceptance, is founded on a misconception, in considering that his liability is voluntary and arises *ex contractu*. The law attaches the responsibility to his employment or calling; and if he assumes the calling, he has no power over the duties which the law annexes to that calling. His assuming the character of a common carrier depends entirely on his own will and assent; but if he undertakes that occupation, the liabilities which come upon him, in respect of goods brought home to him to be carried, are imposed by law, and not created by his assent or agreement. The law of common carriers is different from the law applicable to other classes of people. They are recognized by the law as peculiar persons, in respect to whom, in their employment, non-feasance is a misdemeanor; a failure to carry and deliver safely is a *tort*. (*Merrit v. Earle*, 31 Barb.



38; *People v. Willet*, 26 *id.* 81; *Heirn v. McCaughan*, 32 Miss. 19; *Johnson v. Richardson*, 17 Ill. 303; 1 Sm. Lead. C., note to *Coggs v. Bernard*.) Public policy and fair dealing, on which the extraordinary liability of a common carrier is founded, cannot be undermined and frustrated by the design and circumvention of artfully prepared printed receipts contrived by scheming corporations and soulless companies, thrust upon the public, without an opportunity of fair assent, in the press and hurry of railroad travel. But in the case presented for consideration we suppose there was a special agreement between the parties; it was argued on that hypothesis by the counsel on both sides, and seems to stand admitted by the pleadings. It devolved on the defendant to show, notwithstanding the exception exempting it from loss by fire, that the accident did not occur through any fault, want of care, or negligence, on its part or the part of its agents or employees.

The court refused all the instructions asked for by defendant, and instructed the jury, at the request of the plaintiffs, that "if the cotton might have been saved by due and proper care by defendant or its employees, then the defendant is liable for the loss.

"The burden of proof is on the defendant to show that the cotton was not lost by reason of any want of care, skill, and diligence, on the part of defendant or its employees.

"The defendant is liable for any loss occasioned by the negligence of its agents. If the cotton was burned by reason of the insufficiency of the car in which it was transported, in not being close and tight, then the defendant is liable for the loss."

Other instructions were asked by the plaintiffs, which were refused, and in this refusal we see no error, as the above most clearly lay down the law and explain the defendant's liability, throwing the whole onus upon it.

It has often been held that this court will not reverse a judgment when the court below refused to give instructions perfectly unexceptionable, provided the law was clearly and fully given by the court in others. After the giving of the plaintiffs' instructions, the court, of its own motion, gave the following: "If the

cotton in question was lost by fire, while in defendant's possession, on a railroad train, then the defendant is not liable, if the persons in charge of the train took all reasonable care and observed all reasonable precautions in the management and conduct of the train, and if the car in which the cotton was burned was reasonably tight and suitable for the transportation of such freight." This instruction constitutes the chief error complained of by plaintiffs. We cannot perceive that there is any well-founded objection to it. Taken in connection with the other instructions, in effect it tells the jury that it was incumbent on the defendant, before it could screen or shield itself from liability, to show that its agents took that precaution and used that diligence which were suitable and appropriate to the business it was pursuing and the responsibility it had incurred, and also that the vehicle it used for the purpose of transportation was good and sufficient. The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the common carrier is held to a different and higher degree of diligence; and the word "reasonable," used in the instruction, is intended to convey the idea that the carrier was bound to use that care and foresight which was appropriate to the occasion and necessary to be used in like exigencies and employments, as contra-distinguished from that ordinary care which devolves upon an ordinary bailee. A reasonable act is such act as the law requires. (*Warne v. Bickford*, 9 Price, 43; *Yelv.* 44; *Platt on Cov.* 342, 157.) In *Riley v. Home*, 5 Bing. 220, Chief Justice Best, in discussing this question, says: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by others in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward—namely,

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that of taking all reasonable care of it—the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things—both so well known to all the country when they happen that no person would be so rash as to attempt to prove that they had happened when they had not—namely, the act of God, and the King's enemies." The taking of reasonable care, and the furnishing of cars reasonably safe and suitable for the business—these seem to be the very things required by law; and unless the carrier shows satisfactorily that he has come up to these requirements, he will be responsible for loss, without regard to his special contract for exemption. The law, it is believed, was properly declared, and we cannot undertake to weigh the evidence.

Judgment affirmed. The other judges concur.

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ROBERT McILVAINE, Respondent, v. R. D. LANCASTER, GARNISHEE OF THOMAS F. SMITH, Appellant.

*Garnishment—Trustee—Rents.*—Where one, as agent, collected rents for the trustee of another, and was garnisheed as debtor of the beneficiary, according to the decision of this court in the case of *McIlvaine v. Smith* (*ante*, p. 45) these rents were a trust fund in the hands of the trustee until paid over by him to the beneficiary, and the agent could not be made liable under this process, as the debtor of the beneficiary, for rents so collected as the agent of the trustee.

*Appeal from St. Louis Circuit Court.*

*A. J. P. Garesche & Mead*, for appellant.

I. A trustee can only be sued in equity, and a garnishment is a law proceeding. (*Curling et al. v. Hyde*, 10 Mo. 376.)

II. An agent, not of the debtor, but of a third person, creditor of the debtor, is not liable to be garnisheed, because there is no privity of contract between him and the debtor. A creditor's bill, if any, is the only remedy for the party to enforce payment out of the trust fund. (*Drake on Att. § 487; Pratt et al. v.*

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Scott, 19 Mo. 625; Gould v. Newburyport R.R., 14 Gray, Mass., 472; Skowhegan Bk. v. Farrar, 46 Maine, 293, particularly cases reviewed in opinion; Johns v. Allen, 5 Harring. 419; Plunket v. Le Huray, 4 Harring. 436.)

*Cline, Jamison & Day*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The defendant, Lancaster, was an agent to collect rents for the trustee of Thomas F. Smith, and was garnisheed as a debtor of Smith, the beneficiary. Judgment was rendered against the garnishee upon his answer, and the case was appealed to this court.

According to the decision in *McIlvaine v. Smith et al.*, at this term, these rents were a trust fund in the hands of the trustee until paid over by him to the beneficiary, and the agent could not be made liable under this process, as the debtor of Thomas F. Smith, for rent so collected as the agent of the trustee.

The judgment will be reversed and the garnishee discharged. The other judges concur.

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WILLIAM H. BENTON *et al.*, Respondents, *v.* BERNARD KLEIN,  
Appellant.

1. *Promissory Note — Equitable Defenses — Parol Contract.* — Where the answer to a suit on a promissory note denied the consideration implied by the use of the words "value received" in the body of the note, and the evidence tended to show a special contract between the maker and payee, at the time of the execution of the note, by which the former was to have a definite time to ascertain the value of a certain patent for which the note was given, and the evidence further tended to show that the patent was of no value whatever, such evidence constituted a good defense to the note sued on.
2. *Trial—Evidence—Jury.*—Where any evidence exists tending to show facts which constitute a good defense, the case ought not to be taken from the jury.

*Appeal from St. Louis Circuit Court.*

Defendants asked the following instructions, which were refused:

1. The plaintiffs have no greater interest in or title to the note than Daniel Klein had, from whom they acquired it, and the

defendant should be allowed every just set-off or other defense existing as against Daniel Klein in favor of the defendant before notice of the assignment.

2. If the jury find from the evidence that the defendant has never received a valuable consideration for the note in controversy, they will find for the defendant.

3. If the jury find from the evidence that the note in controversy was signed and delivered by the defendant, with the understanding and agreement that the note was only to be collected in the event of the "patent right" named becoming of use and value to the defendant, and that it was agreed that no payment should be made or required upon such note if such "patent right" should not prove of use and value to the defendant, and further find that the "patent right" has not become of use and value to defendant, they will find for defendant.

4. If the jury find from the evidence in the case that the "patent right" named was the consideration of the note, and that the payment of the note was conditioned upon such "patent right" becoming of use and value to defendant, and further find that without fault of defendant such "patent right" has never become of any use and value to defendant, then the plaintiffs cannot recover.

*Ledergerber, Bowman & Colcord*, for appellant.

I. The court erred in taking the case away from the jury when there was evidence introduced. (16 Mo. 502, 496; 18 Mo. 170; 19 Mo. 451; *id.* 84; 27 Mo. 55; 33 Mo. 202; 34 Mo. 98; *id.* 147; *id.* 461; 5 Mo. 110; 6 Mo. 73.)

II. If the parties, payee and maker, orally agreed that the doing of a certain act by the defendant should operate as a defense, and he did this, it constitutes a defense. (33 Ala. 33; 3 N. H. 455; 12 Wheat. 183.)

III. The evidence introduced is not a variation of the contract, but an explanation of it. (1 Ala. 358; 6 Ala. 146; 17 Pick. 177.)

IV. That the patent did not prove valuable, as promised and assured, is a valid and sufficient defense. (21 Mo. 338; 1 Wend.



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225 ; 14 Pick. 220 ; see same, 217, as to what constitutes a valid patent.) The invention must be useful ; that is, capable of some beneficial use. (15 Johns. 231 ; 12 Conn. 232.)

*Krum, Decker & Krum*, for respondents.

I. Under the pleadings and evidence in this case, the only point is whether a party who has signed a written contract, promising that in six months he will pay a certain sum of money absolutely, can be allowed to show by parol evidence that it was at the same time verbally agreed that it was to be paid conditionally. In other words, whether a written contract may be altered and destroyed by a cotemporaneous verbal contract. This is the only defense made in the answer and attempted on the trial. (Jones v. Jeffries, 17 Mo. 577 ; Smith v. Thomas, 29 Mo. 307, and cases there cited ; 2 Pars. on Bills, 501, and cases there cited ; Lane v. Price, 5 Mo. 101 ; Singleton v. Fore, 7 Mo. 515 ; Woodward v. McGaugh, 8 Mo. 161 ; Cockrill v. Kirkpatrick, 9 Mo. 697.) The answer does not set up fraud, illegality, or want of consideration, but simply that it was not to be paid except on a condition. (2 Pars. on Bills, 508, 513 ; Sto. on Prom. Notes, §§ 17 and 18, p. 196.)

II. Even if this cotemporaneous contract had been in writing, it could not have been used as a defense to this suit ; because, while the note is payable to Daniel Klein, this contract was made with Kelsey & Klein, and the rights of Kelsey could not be adjudicated in a suit brought by Klein, or his assignees, the plaintiffs. (Webb v. Spicer, 13 Ad. & El., N. S., 886 ; Salmon v. Webb, 16 Eng. L. and Eq. 37, approved in 2 Pars. on Bills, 537-8.

FAGG, Judge, delivered the opinion of the court.

This was a suit in the St. Louis Circuit Court upon a promissory note not negotiable. The answer denied the consideration as implied by the use of the words "value received" in the body of the note. The execution of the paper itself was not denied, but a special contract between the maker and payee was alleged to have been made at the same time, by which the former was to have a definite time to ascertain the value of the thing

purchased, and for which the note was given. It was averred that if, upon such trial, the same should prove to be valueless, no portion of the note should be demanded as paid. The thing purchased was the right to manufacture and sell in certain counties in this State a certain "patent improvement in water elevators." The answer further averred false representations, on the part of the payee in the note, as to the cost of manufacturing the articles in question, and that, after being put to great expense in testing the value of the improvement, it had turned out to be of no value whatsoever. Only one witness was examined on the part of the defense, and, at the conclusion of his testimony, the court, at the instance of plaintiffs' counsel, instructed the jury as follows: "The evidence introduced by the defendant does not amount to any defense to the note sued on."

The parties instituting the suit were the assignees of the payee in the note, but there is no question as to the right of the maker to set up the defense which he did. If the facts stated existed previous to any notice of the assignment, and there was any evidence whatever tending to prove them, the case ought not to have been taken from the jury. It ought to be a very clear case indeed to authorize such a practice as this. Whether the statements of the defendant (being the only witness in his own behalf) are worthy of credit or not, belongs exclusively to the jury to determine. They must also pass upon the sufficiency of the testimony to prove the matter relied upon, if it tends in the remotest degree to establish it. We think, upon an examination of the testimony, that there was sufficient to let it go to the jury, and that the instruction was erroneous.

The instructions asked on the part of the defendant, and refused by the court, substantially embodied the principles of law governing in such cases. The facts developed in another trial may not be precisely the same, and we shall not therefore say that they should be given in the exact form in which they were drawn.

For the error in giving the instruction asked by plaintiffs, the judgment must be reversed and the cause remanded. The other judges concur.

H. C. WELLMAN, ADM'R OF HARVEY WELLMAN, Appellant, v.  
DISMUKES AND GLASCOCK, Respondents.

1. *Practice—Amendment—Parties—Trial.*—Where it appears at the trial that one of the parties has assigned all his interest in the matter in controversy to another, the court may amend the record and pleadings by allowing the assignee to be added as a party to the record. (R. C. 1855, p. 1253, § 3.)
2. *Contracts, Executed and Executory—Covenants—Lands—Vendor and Purchaser.*—There is a distinction between the rules which govern the relation of vendor and purchaser before and after the execution of the deed. While the contract remains executory, the purchaser has a right to demand a title clear of all encumbrances and defects. The vendor cannot recover without exhibiting an ability to comply with the stipulations and agreements contained in his covenants. An agreement to make a good and sufficient warranty deed is an agreement for the conveyance of a good title.

*Appeal from St. Louis Circuit Court.*

*Ewing & Holliday*, for appellant.

I. The defense of failure of consideration cannot be set up, as no eviction was shown, and, therefore, no breach of the covenant. (*Hoy et al. v. Taliaferro*, 8 Sm. & M. 727, 241; *Dennis v. Heath*, 11 Sm. & M. 206; *Rawle*, 645, Am. note 1. Even if there was a paramount title in Balthrope, which is not shown, unless there was an adverse possession under it, this is not equivalent to an eviction. (11 Sm. & M. *supra*, p. 218; *Gust v. Hodges*, 2 Dev. 200.) The covenant entered into by Wellman was a covenant of warranty; there was no covenant of seizin; the title bond imports nothing more.

II. If there was a defect in the title, it was known to Dismukes, as the evidence clearly shows, and he cannot retain the purchase money or recover what he has paid. His remedy, if he is disturbed in the possession, must be upon the covenant, as in such case he must be considered to have protected himself against the defect by the covenants in the title bond. The presumption is that the covenant was expressly taken for protection against it. The purchaser shall be bound to perform his engagements whenever his knowledge and the state of facts continue to be the same as they were at the time of the conveyance. (*Bradford v. Potts*, 9



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Barr. 37; Juvenal v. Jackson, 2 Harr. 519; Lighty v. Shorb, 3 Penn. 447; 13 Levy & R. 386.)

III. The court manifestly erred in (on its own motion) substituting Glascock as defendant without allowing plaintiff to reply. Such an order at that stage of the case was irregular and improper in itself; but, having been made, plaintiff should have been allowed to plead as to this new party, and to show, if he could, that Glascock was not entitled to a judgment against him.

IV. The defendant having recovered damages for the breach of the covenant (being the amount of the purchase money, with interest), on the ground that Wellman had no title whatever, the grantee is estopped from setting up the deed afterward as a conveyance of the land against the grantor. The grantor, Wellman, or his representatives have the right to enter again, as against the grantee and his assignee or vendee, and hold under their former possession. (Parker v. Brown, 15 N. H. 176, 188.)

*Dryden & Lindley*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, as administrator of Harvey Wellman, deceased, instituted suit in the Ralls county Circuit Court against the defendant, Dismukes, on two promissory notes made by Dismukes and payable to plaintiff's intestate. It appears from the petition that the plaintiff's intestate sold to the defendant, Dismukes, certain tracts of land described therein, and bound himself by title bond to convey said lands to Dismukes on the payment of the purchase money. The price agreed upon for the land was four thousand dollars, to be paid in three equal annual installments, the first of which was paid; and this suit was brought to enforce the collection of the two deferred payments.

The petition prays for judgment on the notes, and also for the enforcement of the vendor's lien.

Dismukes, in his answer, admits the making of the notes, and the consideration for which they were given, as charged in the petition, but sets up as a defense that, at the time the land was sold to him, the intestate had no right, title, interest, or estate,

whatever, in the said lands, and that his representatives since had acquired none, and that no title could be conveyed by said intestate's representatives on payment of the balance of the purchase money. He further alleged that the whole title in the lands was in one Mrs. Balthrope, a married woman, for life, and remainder in fee, in her seven children, several of whom were minors, and prayed for a rescision of the contract and for judgment for the sum paid by him to the plaintiff's intestate. The plaintiff filed a replication to the counter claim or cross bill set up in defendant's answer.

During the progress of the trial, it appeared that one Glascock had bought at sheriff's sale all the interest of Dismukes in the land in controversy, and that after the institution of this suit Dismukes had assigned and transferred to him all his interest in the same, including whatever claim he might have against the estate of the intestate for the money already paid.

After all the evidence was submitted, and before judgment, the court amended the pleadings by making Glascock a party, who immediately entered his appearance and consented to the proceedings.

The court then, sitting as a jury, found that the intestate was not the owner of nor seized of the land described in plaintiff's petition, and in the title bond given by the said Wellman, deceased, to Dismukes at the date of the said title bond, and that neither his heirs nor representatives had acquired any title since; that at the date of the said title bond the title to the real estate was and ever since has been and now is vested in Mrs. Balthrope for life, with remainder to the heirs of her body in fee; that Mrs. Balthrope was the mother of seven children, of whom several were minors, and that neither said Wellman, deceased, nor his heirs or representatives, could convey the title of said real estate, according to the terms of the bond; that the only consideration for the notes sued on was the land, as stated in the title bond, and that Dismukes had paid the amount specified in the answer; that he had abandoned possession of the land, and that Mrs. Balthrope went into possession of the same, and continued in possession, claiming title; that after the commencement of the suit, Glas-



cock had become the owner of the covenants contained in the deed or title bond of the deceased Wellman to Dismukes, and that all the right, title, and interest of Dismukes therein passed to and vested in him, and that Glascock was the owner and entitled to all the money and damages accruing to Dismukes by or in consequence of the inability of Wellman, deceased, or his representatives, to comply with the terms of the title bond and convey the land.

The court then decreed that the notes sued on be set aside, canceled, and held for naught; that the title bond be canceled; and gave judgment in favor of Glascock, and against the estate, for the amount of money paid by Dismukes to Wellman.

It is objected that the court committed error in allowing Glascock to be made a party, and that if he was rightfully made a party no judgment should have been rendered in his favor without giving plaintiff an opportunity to plead or reply to his claim. If the merits of the cause had been in anywise changed by the introduction of Glascock as a party, there might be some force in the objection; but we are entirely at a loss to see what there was to call for any new pleading or replication. The issues presented were not altered. No new evidence was offered or admitted; it was simply developed that Glascock was entitled to the money as the assignee of Dismukes, and his name was ordered to be added to the record in order to make the pleadings conform to the evidence. There was no pretense that Wellman had any defense to make against Glascock which he had not made against Dismukes. It seems to us that the action of the court was warranted by the circumstances of the case, and comes clearly within the meaning of the statute, which provides that during the progress of a trial the court may, at any time before final judgment, in furtherance of justice and on such terms as may be proper, amend any record, pleading, process, entry, return, or other proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or

proceeding to the facts proved. (R. C. 1855, p. 1253, § 3; Gen. Stat. 1865, chap. 168, § 3.)

It is argued that a failure of consideration cannot be set up, because there was no eviction. There is authority for the doctrine that a vendor of land who has received a deed with covenants of warranty, and been let into possession, cannot, when sued at law on the notes given for the purchase money, set up the defense of failure of consideration without showing an actual eviction. But that principle can hardly be made applicable in this case.

There is a distinction between the rules which govern the relation of vendor and purchaser before and after the execution of the deed. While the contract remains executory, the law recognizes the right of the purchaser to a title, clear of all encumbrances and defects. (Rawle on Covenants, 604.) The vendor cannot recover without exhibiting an ability to comply with the stipulations and agreements contained in his covenants.

In the application of this rule, a difficulty sometimes arises in determining whether covenants are mutual in such a sense that each is a condition precedent to the other, or whether they be dependent or independent. This question must generally be determined in each particular case by inferring, with as much certainty as possible, the meaning and purpose of the parties; from a full survey, the rational interpretation of the whole contract.

The condition in the bond executed by Wellman is as follows: "Now, upon the full payment of the said promissory notes as above, I bind myself, my heirs, and executors and administrators, to make and execute to the said Dismukes a good and sufficient general warranty deed for said lands, as above described." In a very recent case on this question, in the Supreme Court of the United States, where the covenant in the agreement merely stated that the vendor agreed to sell to the purchaser certain property in Chicago, and on the payment of the first installment of the purchase money he would make a deed to the purchaser and take a bond and mortgage for the payment of the balance, it was *held* that where a written agreement for the sale of lands, executed and sealed by the vendor and vendee, binds one party to make a deed for the property, and the other party to pay a certain sum, the cov-

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enants are concurrent and reciprocal, constituting mutual conditions to be performed at the same time ; that the vendor in such case is not bound to convey unless the first installment be paid, nor is the purchaser bound to pay unless the vendor is able to convey a good title, free from all encumbrances : *held*, also, that where the words of the covenant, on the part of the vendor, are, that he will "make a deed" for the property, there is a covenant that the land shall be conveyed by a deed from one who has a good title and full power to convey. (*Washington v. Ogden*, 1 Black, 450.)

There can be no doubt that it was the intention of the parties that a deed should be executed conveying a title to the land when the purchase money was paid. The two acts were to be mutual and concurrent, and the vendor could not meet the measure of his obligation unless he possessed title and was capable of conveying it. The evidence most clearly sustains the finding of the court, that neither Wellman nor his heirs or representatives had any title to the property, nor could they acquire it. There was, then, under any view of the subject, a total and entire failure of consideration, and we think the judgment was right and ought to be affirmed.

Judgment affirmed. The other judges concur.

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DOAN *et al.*, Respondents, *v.* SLOAN, Appellant.

*Limitations—Adverse Possession.*—A defendant, setting up the defense of the statute of limitations against the legal title, must show that his possession was adverse under claim of ownership, and that it had continued a sufficient length of time to bar the owner and those claiming under him. The burden of proof is upon the defendant to show at what time his possession became adverse to the legal title.

*Appeal from St. Louis Circuit Court.*

This was an action in ejectment. The answer put in issue the allegations of the petition, and by way of defense set up the statute of limitations. In 1842 George Morton owned the premises. The plaintiffs gave in evidence a sheriff's deed to Daniel D.

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Page, dated August 6, 1842, made under a judgment against Morton; a deed of trust from Page and wife to S. B. Kellogg, trustee, dated October 2, 1857; and a deed (made after a sale under the deed of trust) from Kellogg, trustee, to plaintiffs, dated October 8, 1864.

The defendant offered evidence tending to show an adverse possession by himself, and also exhibited a deed from Morton to himself, dated November 6, 1862. Plaintiffs also presented evidence to rebut the defendant's adverse possession.

For the plaintiffs, the court gave the following instruction, to which defendant excepted:

"The defendant, in order to prove a defense under the statute of limitations, must show that the possession set up as a defense was adverse to plaintiffs, and those under whom plaintiffs claim title; and that if, from the time of the execution of the deed of the sheriff of St. Louis county to Daniel D. Page, given in evidence by plaintiffs, such possession was not adverse to said Page, the defendant must show when it became adverse, and that such adverse possession of defendant commenced under a claim of title or ownership of said defendant as owning the same for at least ten years before the commencement of this suit, and so continued uninterruptedly and adverse to plaintiffs, and those under whom plaintiffs claim title, for at least ten years prior to the commencement of this suit."

For the defendant, the court gave the following instructions:

1. If the jury find from the evidence that the fee of the premises in question, in the year 1842 and prior thereto, was in George Morton; that the sheriff's deed, read in evidence by the plaintiffs, is genuine; and that the defendant entered into the premises sued for as early as 1842 or 1843, and that he has ever since continued in possession, adverse to D. D. Page, then it was competent for said Page, to whom said sheriff's deed was made, to sue for the possession of the land at any time within twenty years from the date of the defendant's first entry into the premises in question.

2. If the jury find from the evidence that, for a period of ten years and upward next before the commencement of this suit,

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the defendant has held actual, visible, undisturbed, and continuous possession of the premises in question, claiming them as his own, and that such possession of the defendant during all that time has been adverse to the plaintiffs and the party under whom they claim, then they cannot recover in this action, and the jury should find for the defendant.

The court refused to give the following instruction asked by the defendant, and the defendant excepted: "If the jury find from the evidence that the defendant entered into the possession of the premises in question in the year 1842 or 1843, and that he has ever since continued in the possession thereof, and if the jury also find from the evidence that the defendant's said possession has been visible or notorious, and that he, during that time, has exercised acts of ownership over the premises, then the jury may presume that the defendant holds possession of said premises under a claim of title or right thereto."

After the jury had retired, they returned and asked the court the following questions: 1. "The jury wish to know whether the court instructs the jury that the defendant must have proved that he holds adverse to D. D. Page and those claiming under him?" and were told "the court so instructs the jury." 2. "Must the defendant have proved that such adverse possession must be proved by a claim of title or ownership adverse to said plaintiffs, besides the peaceable, notorious, continued, visible possession?" "The court so instructs the jury; that is to say, it must be proved affirmatively by the defendant that he held adverse possession of the property for at least ten years before the suit was brought, and that he held it during that period as the owner of it, not recognizing any body else as owner, and not occupying it as a mere squatter claiming no right to the property."

*Krum, Decker & Krum*, for appellant.

I. The court below erred in giving the instruction asked by the plaintiffs. This instruction is directed to the adverse possession of the defendant. Considered by itself, this instruction does not assert the law correctly on this point. The only interpretation that can be given to it is that the possession of the defendant



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was not adverse unless he proved that it commenced under a claim of title. The succeeding words—"or ownership of the defendant as owning the same"—instead of qualifying the preceding phrase, "claim of title," make it stronger. No one can doubt how the jury interpreted this instruction. The questions propounded by the jury to the court, after they had retired to consider of their verdict, show most conclusively that the jury understood this instruction to mean that the defendant must prove that he had possession of the *locus in quo* under a claim of title; that it was not sufficient for the defendant to possess the premises and claim them as his own, but that the claim must be accompanied by an assertion of title, and that this assertion of title must be proved affirmatively. The jury was misled by this instruction. It was sufficient if the defendant had actual, visible, continuous, and undisturbed possession of the premises, claiming them as his own, no matter whether his claim was founded on a paper title or not. The law does not require him to prove that he asserted his claim under a title, in the common acceptance of that word.

II. The instruction just considered is inconsistent and contradictory to the one directed to the same question and given at the instance of the defendant. The instruction of the defendant on this point asserts the correct rule of law, and is to the effect that if the defendant held the actual, visible, continuous, and undisturbed possession of the premises in question, claiming them as his own, to the exclusion of the plaintiffs, for ten years next before the suit, such possession is a bar to the plaintiffs' recovery.

III. After they had been some time considering their verdict, the court below gave an additional instruction, which amounts simply to an abstract proposition of law. The court, in an instruction single and complete in itself, tells the jury that the defendant must prove that he held the premises in question adversely to Daniel D. Page and those claiming under him. The court does not inform the jury what facts, if proved, will constitute adverse possession, but leaves the jury to interpret the law for themselves. The court below repeated to the jury its previous error in respect to claim of title by defendant, but in a worse form.

IV. The law in respect to adverse possession, as stated in the second instruction asked by the defendant, and given to the jury by the court below, is the true rule and was the law applicable to the facts of this case. The instruction should have been allowed to stand before the jury, unclogged by ambiguous explanations or qualifications. There was no necessity for explanation or qualification. It was shown in evidence, and there was no rebutting proof, that the defendant, for a period of ten years and upward before the suit was begun, held the actual, exclusive, visible, continuous, and undisturbed possession of the premises, claiming them as his own; and very strong circumstantial proof was shown that both Page and the plaintiffs had full knowledge of defendant's exclusive claim of possession during all that time. Not only is such a possession adverse and sufficient to bar the plaintiffs' right of entry, but, under the law in this State, gives absolute title against all parties not excepted by the statute. (*Biddle v. Mellon*, 13 Mo. 335; *Menkens v. Ovenhouse*, 22 Mo. 70-75; *Schultz v. Arnot*, 33 Mo. 172; *Clemens v. Runckel*, 34 Mo. 44; *De Graw v. Taylor*, 37 Mo. 310; 11 Peters 41; 8 Serg. & R. 21.)

V. Possession of land may be adverse without written evidence of right or claim to enter thereon. (24 Ill. 372.)

VI. The court below erred in not giving the instruction refused for the defendant. This instruction is founded on the theory of presumptions. The point in it is that a claim of title or right to land may be presumed from a possession of the character and duration specified in the instruction. (1 Greenleaf on Ev. § 14.) As the statute of limitations is fitly termed a statute of repose, it should receive a fair and liberal construction. The whole spirit of the law governing the construction of statutes of this character, and the rules of evidence, concur in support of the proposition contained in the instruction now under consideration. There is no reason in fact or in law why a claim of title or right may not be inferred or presumed from facts proved in a case like this, as is done in other similar cases. In many cases such inferences or presumptions are drawn *ex necessitate rei*, and the law upholds them.

*Glover & Shepley*, for respondents.

I. It is in any case a substantive part of a title in defense, set up under the statute of limitations, that the possession should be shown to be adverse. This must be done even when the party claims under a recorded deed. The jury must be satisfied that the possession was adverse. It would not, of course, require such evidence in the case of a party claiming under a deed as it would when the party relied alone upon possession. But the element of the possession being adverse is just as essential in the one case as the other.

II. It is especially necessary to make such proof when, as in this case, the possession set up is without any color of title. There was no other color of title exhibited except the deed of Morton to Sloan in 1862. There was no evidence that Morton claimed it, nor any evidence that Sloan claimed as owner, except that of collecting nominal rent. (Ang. on Lim. 404.)

III. The instructions given properly presented the law applicable to the case. The first given for the plaintiff and the one given on behalf of the defendant both held that, to enable the defendant to successfully set up the statute of limitations as a defense, he must show as one of the elements that the possession was adverse. There is no contradiction between the two. The one given on behalf of the plaintiff goes further than the other, and holds that if the possession, when it commenced, was not adverse, then it was incumbent upon the defendant to show when it became so. There was nothing in the instruction given for the plaintiff calculated to mislead the jury, or that could have misled them, and their questions to the court show that they were not misled.

IV. There was no evidence tending to show that the possession was adverse to the true title—certainly none that could warrant the jury in finding the fact of an adverse possession.

V. The court committed no error in its answer to the inquiries of the jury. It is objected to the answer to the first inquiry that it is a mere abstract proposition of law, and therefore objectionable. The inquiry of the jury was not upon a new subject or

for any new law, but to find out what the court meant by the instructions already given to them. To that the court made a fitting response. The response of the court to the second question of the jury was in all respects proper, and the jury were not misled by it. They fully understood the distinction between title and ownership.

WAGNER, Judge, delivered the opinion of the court.

The giving and refusing of instructions constitute the errors complained of in this cause. The defendant went into possession of the premises under Morton; and if he claimed to hold or possess them adversely to the Page title, it devolved on him to show at what time the adverse possession commenced. Whilst it is true that the statute of limitations is to be regarded as a statute of repose, a party relying on the statute, to be protected under it, must show such possession as will bring his case within its provisions. If the defendant's title is not adverse, or under a claim of title for the requisite time, to be set up as a bar, there is nothing on which to invoke the aid of the statute. The instruction given on behalf of the plaintiffs tells the jury that the defendant, in order to prove a defense under the statute of limitations, must show that the possession set up as a defense was adverse to the plaintiffs, and those under whom the plaintiffs claim title; and that if, from the time of the execution of the deed from the sheriff of St. Louis county to Daniel D. Page, given in evidence by plaintiffs, such possession was not adverse to said Page, the defendant must show when it became adverse, and that such adverse possession of defendant commenced under a claim of title or ownership of said defendant as owning the same for at least ten years before the commencement of the suit, and so continued uninterruptedly and adverse to plaintiffs, and those under whom plaintiffs claim title, for at least ten years prior to the commencement of the suit.

The second instruction given for the defendant told the jury that if they believed from the evidence that, for a period of ten years and upward next before the commencement of the suit, the defendant had actual, visible, undisturbed, and continuous possession of the premises in question, claiming them as his own,

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and that such possession of the defendant during all that time had been adverse to the plaintiffs and the party under whom they claimed, then they could not recover in the action, and the jury should find for the defendant.

There is no such inconsistency in these two instructions as would be calculated to mislead, and taken together they declare the law correctly and in accordance with the doctrine established by the prior decisions of this court. There is nothing objectionable in the action of the court below in the answers given to the inquiries of the jury when they came into court for information. The additional instruction amounted to nothing more than a reiteration of the law as previously declared, couched in language more direct, plain, and comprehensible. Upon the whole case, we have failed to discover any error.

Judgment affirmed. The other judges concur.

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JAMES B. EADS, Plaintiff in Error, *v.* THE CITY OF CARONDELET,  
Defendant in Error.

1. *Contract — Acceptance — Mutual Assent.*—Where a city council passed an ordinance, first accepting a written proposal touching the erection of certain machine-shops, etc., and then providing the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but "on such further conditions as may be deemed necessary," and further authorizing the mayor to enter into a written agreement relative to such proposition: *held*, that the contract was not complete and could not be enforced against the city until its terms were fully agreed upon and the contract closed by writing. (An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time existed the requisite mutual assent to the same thing in the same sense.
2. *Contract — Parol, must be put in writing, when.*—When a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form.

*Appeal from St. Louis Circuit Court.*

*Glover & Shepley*, for plaintiff in error.

I. The second section of defendant's ordinance did not have the effect to withdraw the positive acceptance made in the first section,



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or in the least to modify it. The city council of Carondelet nowhere intimate that they take back their acceptance. On the contrary, they direct their agent to enter into a written agreement embracing the terms of Eads's proposition. They tell him to close the contract between said city and Eads. The ordinance embraces every element of a contract agreed on and in writing. The real expressed intention is that the writings, when drawn, after setting forth the terms of Eads's proposition, shall embrace also "such further conditions as may be deemed necessary." But it is not said that the absence of any named condition shall defeat the contract already made.

II. In order to constitute a binding contract, there must be a definite promise by the party charged, accepted by the person claiming the benefit of such promise. (Chitty on Cont. p. 9, 5th Am. ed.)

III. In contracts, justice should be done between the parties by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made. (Chitty on Cont. p. 73, 5th Am. ed.) In this case, the fact that Eads immediately complied with the agreement on his part not only manifested his understanding, but fixed on the city council the knowledge of the manner in which he received their acceptance of his proposition. As to construction of contracts of the above nature, see, generally, 11 Verm. 583; 10 Pick. 230; 14 Verm. 311; 19 Verm. 202; 6 B. Mon. 619; 3 Story, 122, 273; 2 Shepley, 233.

*Jecko & Clover*, for defendant in error.

I. A mere voluntary compliance with the conditions of the proposed contract by the plaintiff did not render the defendant liable on the contract. (Johnson v. Fessler, 7 Watts, 48; Ball v. Newton, 7 Cush. 599; Meynell v. Surtees, 31 E. Law & Eq. 475.)

II. The proposition for a contract set forth in the petition could only become a binding contract when met by an acceptance which corresponded with it entirely and adequately, leaving nothing further to be done to complete the contract. (Honeyman v. Marryatt, 6 H. L. Cas. 112; Hough v. Brown, 19 N. Y.; 5

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Smith's Ct. of App. 111; Taylor v. Rennie, 35 Barb., N. Y., 272; McColter v New York, 35 Barb., N. Y., 609; Underhill v. N. Am. Ins. Co., 36 Barb., N. Y., 354; Hutcheson v. Blakeman, 3 Met., Ky., 80; Crane v. Portland, 9 Mich. 493; Brown v. Rice, 29 Mo. 322.) Where one party proposes a certain bargain, and the other agrees, subject to some modification or condition, there is no mutuality of contract until there has been an express assent to it so modified; otherwise it would not be obligatory on both parties, and would therefore be void. (Boyd v. Hind, L. T., N. S., Exch. 246.) By defendant's ordinance, the proposition of Mr. Eads was simply not accepted. The city contemplated a written agreement which was to embrace not only the proposition mentioned in the first section of the ordinance, but which, it is expressly declared, was to contain such further conditions as might be necessary, and to close the contract, as yet open and unclosed, between the city and Eads. (Barker v. Allan, 5 Hurl. & Norman Exch. 67; Jordan v. Norton, 4 Mees. & W. 155; Cooke v. Oxley, 3 Tenn. 653; Routledge v. Grant, 15 Eng. C. L. Rep. 99; Hutchison v. Bowler, 5 Mees. & W. 535; Ridgway v. Wharton, 6 H. L. Cas. 257; Fenno v. Weston, 31 Verm. 351; Andrews v. Garrett, 6 C. B., N. S., 262; Esmay v. Groton *et al.*, 18 Ill. 487; Carr v. Duvall *et al.*, 14 Pet. 81; Eliason v. Henshaw, 4 Wheat. 228.)

WAGNER, Judge, delivered the opinion of the court.

This case is brought before us on a writ of error, prosecuted from a decision of the court below, sustaining a demurrer to the plaintiff's petition. The plaintiff alleges in his petition that on the 23d day of May, 1862, he had entered into a contract with the government of the United States to build and construct six gunboats; that in the construction of the boats a large number of persons would necessarily have to be employed, and a large quantity of money disbursed; that defendant was anxious to have the boats built within its corporate limits; and that one William Taussig, on behalf of the city council, representing the defendant, requested the plaintiff to submit to the said city council a proposition stating upon what terms he would build said boats

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and establish his boat-yard in the said city of Carondelet, and thereupon the plaintiff did, on the said 23d day of May, 1862, make to the city council a proposition in writing, addressed to William Taussig.

The letter containing the proposition and the terms on which plaintiff would agree to build his boats and establish his boat-yard in Carondelet is set out at length in the petition. The proposition was to be open for the acceptance and approval of the city council until the next day at noon. The petition further alleges that on the 24th day of May, 1862, and before noon of that day, the city council of the city of Carondelet did pass an ordinance of said city, which was then and there duly approved by the mayor thereof, which is as follows:

"No. 381. An ordinance authorizing the mayor to enter into a contract with James B. Eads.

*"Be it ordained by the City Council of the city of Carondelet, as follows:*

"SECTION 1. That the proposition of James B. Eads, addressed to Dr. Wm. Taussig, bearing date 23d May, 1862, and submitted to the city council at a meeting held on said day, relative to the building within the city limits of the city of Carondelet of six iron gunboats, the erection of machine-shops, ways, and the construction of a boat-yard, to be a permanent establishment for five years from said date, is hereby accepted by said city.

"SEC 2. The mayor is hereby authorized and empowered to enter into a written agreement with said James B. Eads, embracing the terms of the proposition mentioned in the first section of this ordinance, and such further conditions as may be deemed necessary, and to close the contract between said city and said Eads; he is further authorized to employ counsel for the purpose of properly drafting the contract or agreement contemplated by said proposition and this ordinance.

"SEC. 3. This ordinance to take effect on and after its passage

"Approved May 24, 1862."

The petition avers that the ordinance was at once communicated to plaintiff, and that, trusting to the good faith of the corporation

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in carrying out the agreement thus entered into between the defendant and himself in complying with its engagements, he at once proceeded to erect his buildings, put up the requisite machinery, and establish a boat-yard; that he has performed and fulfilled all the agreements and engagements on his part, but that the said defendant has failed to keep and perform its part of the contract, wherefore suit is brought.

The question here does not relate to the meaning or interpretation of the supposed contract, but is whether there was any contract made and entered into which was binding on the parties.

(There can be no valid contract unless the parties thereto assent, and they must assent to the same thing in the same sense. (1 Pars. on Cont. 475; 1 Sto. on Cont. § 378; Hazard v. New England Marine Ins. Co., 1 Sum. 218; Greene v. Bateman, 2 Woodb. & M. 359; Barlow v. Scott, 24 N. Y. 40.) In *Honeyman v. Marryatt*, 6 H. L. Cas. 112, a proposition to sell real estate was accepted, subject to the terms of a contract to be arranged between the parties, and it was held that there was no complete contract in the case. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. And when a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form. If we were at liberty to construe the first section of the ordinance alone, and wholly disregard the other parts, we should find no difficulty in finding the existence of a valid contract. But this we cannot do; the whole ordinance must be taken together to ascertain with what intent it was framed, and what was necessary to be done to carry it into execution and impart to it validity and force. After accepting the proposition of Eads in the first section, the second section proceeds to provide the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but on such further conditions as may be deemed necessary. The mayor is authorized and empowered to enter into a written agreement with Eads, embracing the items of the proposition mentioned in the first section of the

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ordinance; and, to superadd further conditions which may be deemed necessary for the purpose of properly drafting the contemplated agreement, he is authorized to employ counsel. A written agreement is expressly provided for and contemplated, with such conditions as the mayor, acting for and in behalf of the city, might deem advisable. The ordinance was at once communicated to Eads, and he saw the terms and conditions annexed to the acceptance of his proposition. If he intended to hold the city, it was his duty to have the terms agreed upon and the contract closed by writing.

Judgment affirmed. The other judges concur.

[END OF OCTOBER TERM.]



CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
JANUARY TERM, 1868, AT JEFFERSON CITY.

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STATE OF MISSOURI, Appellant, *v.* MINOR NEAL, Respondent.

1. *Constitution—Voters—Oaths.*—The case of *The State of Missouri v. Cummings*, decided in the Supreme Court of the United States, applies to all cases where the right to exercise any trade, calling, or profession, without taking the oath prescribed by the new constitution of Missouri, has been questioned, but not to the case of a voter. (*Blair v. Ridgley*, 41 Mo. 63, affirmed.)
2. *State Convention—Powers.*—The framers of the new constitution had the authority to declare it in full force without making provision to submit it to the voters of the State; and their power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument, cannot be seriously questioned. The ordinance had in itself every element necessary to give it legal force and effect, and was, therefore, binding upon the voter.
3. *Indictments—Sufficiency.*—In an action for perjury, for falsely taking a certain prescribed oath, where a part only of the oath was falsely taken, the indictment need not set out the whole, but may set out merely that portion of the oath taken which contained the falsehood.

*Appeal from Cooper Circuit Court.*

Respondent was indicted, in the Cooper Circuit Court, for perjury, under § 6, art. 13, of the constitution. The indictment, in substance, charges that the people of Missouri, in convention assembled, on the 8th day of April, 1865, adopted a revised and

amended constitution of the State, and, for the purpose of ascertaining the sense of the people in regard to the adoption or rejection thereof, required that the same should be submitted to the qualified voters of the State at an election to be held on the sixth day of June, 1865, and that no person should be allowed to vote who would not be a qualified voter according to the terms of the second article thereof; that in pursuance thereof an election was held at the Otterville election precinct, in Cooper county, for the purpose of ascertaining the sense of the people in regard to the adoption or rejection of the constitution; that Wm. R. Dempsey, H. A. Johnson, and C. F. Hardwick, were the judges of the election, duly appointed and qualified as such; and that at said election, and before said judges, the respondent appeared and offered his vote; and that, in order thereto and before his vote was given, he was duly sworn and took his corporal oath before said judges; and that he, the respondent, not regarding the laws of the State, did then and there, falsely, willfully, corruptly, and feloniously, say, depose, and swear, touching his right to vote at said election, in substance, among other things, that he had never directly or indirectly done any of the acts mentioned in the third section of the second article of the constitution of the State of Missouri, adopted on the 6th day of January, 1865; that he had always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic: whereas, in truth and in fact, he had not always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic, but did, on or about the 20th day of the month of August, 1861, in the county of Cooper, give aid and comfort to the then existing rebellion, by furnishing one Augustus Zollinger with twenty dollars in lawful money, and twenty yards of jeans, and otherwise supplying him, the said Augustus Zollinger, with means for the purpose of enabling him to enlist in the armies of the rebellion.

Respondent assigned for causes of demurrer, with several others, the following: 1. Section 3, Art. II, of the constitution, is a bill of attainder. 2. Section 3, Art. II, is an *ex post facto* law, within the meaning of the constitution of the United States.

3. The indictment fails to charge defendant with the taking of any oath prescribed by law. 4. The indictment does not allege the time and place when and where the supposed offense was committed, nor the time and place when and where the acts prohibited by the third section of said constitution, and alleged to have been committed, were done or committed.

*R. F. Wingate*, Attorney-General, for appellant.

I. The indictment is sufficiently certain and explicit in alleging an offense under, and punishable by, the laws of the State. (See Constitution of Missouri, art. 6, § 13; also, §§ 1, 2, and 4, chap. 203, Gen. Stat. Mo. 1865; Wharton's Precedents of Indictment, p. 590.)

*Draffin, Hutchison & Muir*, for respondent.

I. It is alleged in the indictment that the oath taken by defendant was taken on the 6th day of June, 1865, at which time there is no pretense that the new constitution had been adopted by the people of this State; and before its ratification or adoption no criminal prosecution could have been begun for any violation of its provisions. A person then taking the oath in violation of its terms, before its adoption, would, in legal contemplation, be guilty or innocent of the crime of perjury, dependent upon the contingent future event of the adoption or rejection of said instrument—a theory which can rest on no legal principle. The fact, when committed, is either innocent or criminal, and cannot derive any quality of criminality from the happening or not happening of any future event.

II. The disabilities contained in said third section, and called qualifications, are really penalties. (State of Missouri v. Cummings, 4 Wall. 277.) The case then before the court was against Cummings, who was a minister of the gospel; but the court could not have pronounced said section void, as being a bill of attainder or an *ex post facto* law, because Cummings was a preacher. That question depended upon the nature and quality of the terms and provisions of the act itself. (See, also, State of Missouri v. Murphy, 41 Mo. 339.) The prohibition against the

exercise of such power by the State is unqualified and absolute. No exception is made in favor of or against this individual or that; nor in favor of or against this class of individuals or that.

III. The indictment fails to charge defendant with the taking of any oath prescribed or required by law. Although the third section is recited in the indictment, yet nowhere in it is there any language employed charging the fact to be that said third section, or any part of it, was embodied in the oath taken by defendant. The words ought to be set out exactly as sworn. An innuendo may elucidate what is already averred, but cannot add to or enlarge or alter its sense. (See Chit. Crim. L. vol. 2, p. 310.)

FAGG, Judge, delivered the opinion of the court.

This was a prosecution instituted against the respondent, in the Circuit Court for Cooper county, under the provisions of an ordinance adopted by the constitutional convention of the State on the 8th day of April, 1865. That ordinance was adopted simultaneously with the constitution framed by that body, and contained the provisions that were deemed necessary and proper for putting that instrument in force.

There was a demurrer to the indictment, which was sustained, and judgment given for the respondent. This judgment was affirmed upon an appeal taken to the proper district court, and the case is now brought here by appeal on the part of the State. All of the questions in the case therefore arise upon the demurrer.

The first two causes of demurrer contain the allegation that the third section of the second article of the constitution of this State is a bill of attainder and an *ex post facto* law, within the meaning of the constitution of the United States, and that it is therefore void and of no effect.

The case of *The State v. Cummings*, decided by the Supreme Court of the United States, is relied upon as an authority broad enough to cover every class of cases to which that section was intended by the convention to apply.

It is sufficient to say that the authority of that decision has been fully recognized and acted upon by this court in all cases where the right to exercise any trade, calling, or profession, with-

out taking the prescribed oath, has been questioned. A distinction, however, was drawn by a majority of this court between cases of that character and the case of a voter.

The reasons for that distinction were very fully stated in the case of *Blair v. Ridgley*, 41 Mo. 63, and need not be repeated here. There has been no interpretation of the section in question by the Supreme Court of the United States since the last decision referred to, and we are unable to find any reason in the present case to change our views of the law. Aside from the general causes of demurrer assigned, there are several of a specific character, all of which go to the sufficiency of the facts averred, as well as to the existence of any law creating and defining the offense as charged in the indictment. The convention might (if it had been deemed proper to do so) have declared the constitution framed by it in full force and effect without making provision for its submission to the voters of the State.

As the representatives of the people, clothed with an authority so ample as that, certainly its power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument cannot be seriously questioned. The ordinance had in itself every element necessary to give it legal force and effect, and was therefore binding upon the voter. It is no objection to it that the terms of the oath required were not all contained in the ordinance itself. They were referred to in such manner as to indicate most clearly what was required of the voter, and it is not possible that he could have been misled or deceived in any way. The offense created by this ordinance is not the doing of any of the acts enumerated in the section of the constitution to which it refers. It consists simply in falsely taking the prescribed oath. If the oath should be false as to any one of the acts enumerated in the third section of the second article, then the offense would be complete, and the party, upon conviction, should be adjudged guilty of perjury, and punished therefor in the manner prescribed by law.

This provision has reference solely to the manner and extent of the punishment as now fixed by law for the crime, as defined by statute, and to nothing else. It is a separate and distinct offense,



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made so by the ordinance. We find nothing in the objections to the indictment on the ground of the want of certainty. The time, place, and persons before whom the oath was charged to have been taken, as well as its materiality, seem to have been set out with sufficient certainty for all the purposes required by law. The respondent was apprised, with sufficient particularity, of the precise acts which constituted his oath a false one and identified the exact charge preferred against him.

It is insisted, on the part of the respondent, that the entire oath should have been set out in the indictment. The necessity for this is not perceived. The oath embraced several things necessary to constitute a qualified voter.

It might be true that a person applying to vote under the provisions of the ordinance could safely take one part of the oath and not another. A part might be true and a part false. In such case, if the whole should be taken, the crime would consist alone in taking so much as was untrue, and it would only be necessary to set out so much as embraced the falsehood.

The case of *Campbell v. The People*, 8 Wend. 636, is, in all of its material features, similar to the one at bar. The judge, in delivering the opinion of the court, and upon this very point, uses the following language: "It cannot be necessary to set out the whole of the oath. Such parts of it as are alleged to have been false, and are material in the given case, are all that it can be requisite to state." And so we think in this case. The principles of criminal pleading require no more than was done.

The judgment of the District Court must be reversed and the cause remanded to the Circuit Court. The other judges concur.

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P. W. HARPER, Appellant, v. C. W. HOPPER, Respondent.

1. *Executions—Notice.*—The provision of the statute (Gen. Stat. 1865, ch. 160, §§ 43, 44) which requires notice to be given to a defendant where an execution is issued to a county other than that in which he resides, has been uniformly held to apply only to cases where the execution is sent to be levied on land situate in a county different from that in which the judgment was rendered and the execution issued.

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Harper v. Hopper.

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*Appeal from Polk Circuit Court**McAfee & Phelps*, for appellant.

I. Where the defendant in execution is a non-resident of the county where the land was sold on execution, he is entitled to notice, or the sale will be set aside, on motion, at the return term of execution. (Ray v. Stobbs, 28 Mo. 35; see, also, Hobein v. Murphy, 20 Mo. 447; Harris v. Chouteau, 37 Mo. 165; Buchanan v. Atchison, 39 Mo. 503; Harrison v. Cachelin *et al.*, 35 Mo. 79.)

WAGNER, Judge, delivered the opinion of the court.

There is no question made as to the validity of the judgment or the jurisdiction of the court, and the only point to be determined is, whether the sale of the land by the sheriff of Polk county, without notifying the defendant in the execution, impresses the sale with such illegality as entitles the defendant to avoid it. It is agreed that, at the time the judgment was rendered, the defendant was a resident of another county in this State, and that he continued so to reside when the execution was sued out and the land was sold, but he appeared to the action and made his defense.

In giving a construction to the statute which requires notice to be given to a defendant where an execution is issued to a county other than that in which he resides, this court has uniformly held that the provision only applied in cases where the execution is sent to be levied on land situate in a county different from that in which the judgment was rendered and the execution issued. (Harris v. Chouteau, 37 Mo. 165; Buchanan v. Atchison, 39 Mo. 503.)

There is nothing in the present case to distinguish it from those referred to. Although the defendant did not reside in Polk county when the judgment was taken, yet he appeared and defended the suit. The execution was issued to the sheriff of that county, and the land levied on and sold was situated in the same county. He then had sufficient notice that an execution would issue to that county, and he cannot bring himself within the mischief intended to be remedied by the law in reference to executions.

Judgment affirmed. The other judges concur.

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Koontz v. Hannibal Savings and Ins. Co.

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A. H. C. KOONTZ, Respondent, v. HANNIBAL SAVINGS AND  
INSURANCE COMPANY, Appellant.

1. *Policies of Insurance, when void in part; when in toto.*—The doctrine “void in part, void in toto” has no application to instruments or contracts which contain some forbidden vice or void parts, if the good be mixed with the bad, provided the separation can be made. The exceptions are, where a statute, by its express terms, declares the whole instrument or contract void on account of some provision which is unlawful; or where there is some all-pervading vice, such as fraud, or some unlawful act which is condemned by public policy or the common law, and avoids all parts of the transaction because all are alike infected.
2. *Policies of Insurance—False Warranty.*—Where a policy of insurance upon a certain livery stable was made to cover both the personal and real estate, and the application of the assured contained a false warranty touching encumbrances upon the real estate; and where it further appeared that the personal property was separately valued and appraised, and nothing showed that the representation as to the encumbrances upon the stable formed any inducement to the execution of the policy covering the personal property: *held*, that the assured might recover the value of the latter, although the policy was rendered void as to the real estate by reason of such false warranty.

*Appeal from Cooper Circuit Court.*

This action was upon a policy of insurance issued by defendant upon the livery stable and other property of plaintiff in the city of Boonville, Cooper county. The policy issued by defendant contained the following clause in reference to the application for insurance and the description of property: “The application and description referred to in this policy shall be considered a part of this contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or otherwise, or any omission to make known any fact material to the risk, or any over-valuation, or any misrepresentation whatever, either in the written application or otherwise, shall render this policy void and of no effect.” Upon which condition, with others, it was declared in the policy that the said policy was made and accepted.

On the 21st day of January, 1866, the livery stable and its contents were destroyed by fire; and this action was brought to recover the value of the policy. Other facts material to the case appear in the opinion of the court.

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*Wingate & Brady, and Adams, for appellant.*

The respondent's answer to the question propounded to him in his application for insurance, during the existence of any encumbrance upon the property, constituted a warranty both by the terms of the policy and the application which formed a part of the policy, and was in the nature of a condition precedent to any recovery upon the policy. It was untrue when made. The encumbrance upon the estate, existing in favor of Myers, was a breach of the warranty, and a complete bar to any recovery for any part of the loss, either for the real or personal property. (3 Kent's Com. 288; Ang. on Ins. §§ 139, 140, 141, 142 *a.*, 148; Ellis on Fire and Life Ins., Shaw's ed., 81; see, also, the provisions of the policy sued on, which prevent any recovery at all in this case; Loehner v. Home Mut. Ins. Co., 17 Mo. 250; Lit. & Blach. Dig. Fire Ins. Dec. 167, § 2; Friesmuth v. Agawam Mut. Ins. Co., 10 Cush., Mass., 587; Lee v. Howard Fire Ins. Co., 3 Gray, Mass., 583; Smith v. Empire Ins. Co., 25 Barb. 497; Lovejoy v. Augusta Mut. Fire Ins. Co., 45 Me. 472; Richardson v. Maine Ins. Co., 46 Me. 394; Hutchison v. The Western Ins. Co., 21 Mo. 100, 101, etc.; Borradaile v. Hunter, 5 Man. & Gran. 639; Newcastle Fire Ins. Co. v. McMorran, 3 Dow. 262; Ang. on Ins., appendix 7; Arnold on Ins. 58; Deitz v. Mound City Ins. Co., 38 Mo. 85.

*D. A. McMillan, and Draffin, Hutchinson & Muir, for respondent.*

The policy of insurance covered the livery stable, live stock, and other personal property of the assured, but each was separately stated and appraised; and a failure to disclose a deed of trust on the real estate, though avoiding the policy as to the stable, would not avoid it as to the live stock and other personal property insured in the same policy. The principles involved in this case are the same as those in Loehner v. Home Mut. Ins. Co., 17 Mo. 247; Clark v. N. E. Mut. Ins. Co., 6 Cush. 343; Phoenix Ins. Co. v. Lawrence *et al.*, 4 Met., Ky., 9 and 12, 3d sub.; Trench *et al.* v. The Chenango County Mut. Ins. Co., 7 Hill, N. Y., 122.

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Although the case of *Trench et al. v. The Chenango County Mut. Ins. Co.* has been reversed by the Court of Appeals of that State in the case of *Wilson v. Herkimer County Mut. Ins. Co.*, 2 Seld., N. Y., 53, yet the principle of the divisibility of contracts of insurance, as laid down in that case, is not controverted.

The maxim "void in part, void *in toto*" expresses no general principle of law. On the contrary, the general rule is that the good shall stand, although mixed with the bad. And a policy of insurance may be void in part and valid in part if the subject matter is capable of being separated. (See cases above cited, and *Curtis et al. v. Leavitt*, 15 N. Y. 9; *Chitty on Cont.* 692.)

WAGNER, Judge, delivered the opinion of the court.

The single point presented by the record in this case is, whether the court committed error in holding that the assured might recover the value of the personal property covered by the policy of insurance, when the policy as to the real estate was admittedly void.

The action was instituted on a policy of insurance executed by the defendant to the plaintiff, founded upon a written application made by the assured, which, by the terms of the policy, became and formed a part of the policy itself. The written application, which constituted a part of the policy, contained the following interrogatories: "What is the title?" Answer, "Fee simple." "Is your property encumbered? by what? and to what amount?" Answer, "No." The application then concluded with these words: "The foregoing is a correct description of the property to be insured, and a warranty on the part of the applicant on which the insurance will be predicated; and the applicant hereby agrees to accept the policy hereon from said company, if this application be approved." The policy covered a livery stable, and horses and other personal property in the same, and insured the plaintiff against loss by fire which might happen, except where the fire occurred by the negligence or design of the insured. The policy was for \$5,000—one thousand dollars being on the livery stable, and the balance on the personal property. The property was separately valued and appraised, and, after the insurance attached, was all consumed by fire. The answer of the plaintiff to the



question concerning encumbrances was untrue, as there was a deed of trust upon the real estate at the time it was made. As the record stands, it is conceded by the plaintiff that the policy was void as to that property, and so the court below determined, but held it a valid and subsisting contract as to the other property. It is now contended by the counsel for the defendant that the contract was an entirety; that it was indivisible in its nature, and that if it was void in part it was void in whole. In the case of *Curtis v. Leavitt*, 15 N. Y. 9, the court, in speaking of instruments or contracts which contain some forbidden vice, or void parts, repudiate the doctrine expressed in the words, "void in part, void *in toto*," and declare the general rule to be, that if the good be mixed with the bad, it shall nevertheless stand, provided a separation can be made. The exceptions are, where a statute, by its express terms, declares the whole instrument or contract void on account of some provision which is unlawful; or where there is some all-pervading vice, such as fraud, or some unlawful act which is condemned by public policy or the common law, and avoids all parts of the transaction because all are alike infected. (1 Pars. on Cont., 5th ed., 457; *Peltz v. Long*, 40 Mo. 532.)

The present case does not come within the exceptions above stated, though there are cases deciding that the contract of insurance, predicated on policies like the one under consideration, is an entire contract, unsusceptible of division, and that a breach of warranty, avoiding a part, will invalidate all. This court, however, in a case not distinguishable from the one we are now considering, has held otherwise.

In *Loehner et al. v. Home Mutual Ins. Co.*, 17 Mo. 247, it was held that although a failure to disclose an encumbrance would avoid a policy on a house insured, yet it would not avoid it as to furniture insured in the same policy, but separately appraised, unless the fact concealed was shown to be material to the risk. Where a firm obtained insurance upon a storehouse, and a stock of goods therein for a separate sum, and the interest of the insured in the house was incorrectly described, by reason of which the policy was void as to the house—in a suit brought to recover for the loss of the goods, it was decided that, in the

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absence of proof that the plaintiff procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, the policy was not vitiated as to the insurance on the goods. (Phoenix Ins. Co. v. Lawrence *et al.*, 4 Met., Ky., 9.)

In Clark v. N. E. Mut. Fire Ins. Co., 6 Cush. 342, the policy contained a provision that when any of the property insured should be alienated, the policy should be void. Several pieces of property were insured in the same policy, though they were valued and insured separately, and one piece of property was alienated after the insurance was effected; it was held that this did not avoid the entire policy, but only rendered it void *pro tanto*.

Trench v. The Chenango County Mut. Ins. Co., 7 Hill, 122, is a case in which an action was brought on the policy issued by the defendants, by which they undertook to insure the plaintiffs \$750 on their paper-mill, and the like sum on certain personal property therein. The defense was that the application did not mention all the buildings standing within ten rods of the mill, agreeably to the following condition annexed to the policy: "Such application shall contain the place where the property is situated; of what materials it is composed; its dimensions, number of chimneys, fire-places, and stoves; how constructed; its relative situation as to other buildings; distance from each if less than ten rods; for what purpose occupied; and whether the property is encumbered, by what, and to what amount; and, if the applicant has a less estate than in fee, the nature of the estate." The application for insurance described some of the buildings standing within ten rods of the property insured, but omitted to mention others situated within that distance, and it was adjudged that the condition related exclusively to applications for insurance upon buildings, and, therefore, furnished no ground of defense to the plaintiffs' claim respecting the personal property covered by the policy. The case in Hill is very much shaken by a subsequent determination in the Court of Appeals, in Wilson v. The Herkimer County Mut. Ins. Co., 2 Seld. 53; and in Smith v. Empire Ins. Co., 25 Barb. 497, a contrary doctrine is held; and the case of Brown v. The People's Mut. Ins. Co., 11 Cush

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280, and other cases which we have examined in Massachusetts and Maine, are in conflict with it.

It will thus be seen, from the foregoing cases, that if there were no binding precedent in our own reports, we might adopt either view of the question and be well sustained by authority. Upon an examination of the application which made a part of the policy, there can be but little room for doubt that the warranty against encumbrances was intended to apply exclusively to the livery stable. The other property was separately valued and appraised, and there is nothing to show that the representation as to encumbrances on the stable formed an inducement to the execution of the policy covering the personal property. We consider the case of *Lohner v. Home Mut. Ins. Co.* binding authority, and we follow it cheerfully, because we regard it as in consonance with justice.

Judgment will be affirmed; the other judges concurring.

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THOMAS W. PEERY, Respondent, *v.* P. W. HARPER *et al.*,  
Appellants.

1. *Attachment—Plea in Abatement—Answer.*—Where, in a suit by attachment, defendant pleads in abatement, and the issue is found in his favor, and he afterward answers, setting up the defense that neither plaintiff nor defendant resided in the county in which the suit was brought, the ruling of the court in causing the same to be stricken out was erroneous. Under the 42d section of the present attachment act (Gen. Stat. 1865, p. 567), the suit should have been proceeded upon to final judgment as though commenced by summons alone; and in suits so commenced, one of the parties must reside in the county where suit is brought in order to confer jurisdiction. (Gen. Stat. 653, § 1.) Hence, the answer, if true, was a complete bar to the action.

*Appeal from Polk Circuit Court*

Plaintiff commenced suit by attachment against Harper, and by summons against Smith. The ground of attachment against Harper was, that he was a non-resident of this State. Harper appeared, filed his plea in abatement, and the issue was found for him. Smith did not appear. Harper then put in his answer, alleging that neither plaintiff nor defendants were residents of Polk county, etc.

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*McAfee & Phelps*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

The only point saved by the record is the action of the court in striking out defendants' answer. The suit was brought by the plaintiff in Polk county; and one of the defendants, Smith, resided in Henry county, and the other defendant, Harper, resided in Saline county.

Harper appeared and filed his answer, stating that neither the plaintiff nor defendants resided in Polk county, and prayed that the case be dismissed. This answer was stricken out, on motion of plaintiff's attorney, because it was not responsive to the petition, and because it was irrelevant, redundant, and frivolous. No further answer being made, judgment was rendered against the defendants.

I cannot perceive on what grounds the ruling of the court was predicated. If the answer was true, it divested the court of all jurisdiction. Under the law governing the case, when the plea in abatement was found for the defendant, the whole proceedings should have abated; but even on the theory on which the case was tried, that it was regulated and controlled by the forty-second section of the attachment act of the General Statutes, the judgment was erroneous, for that section declares that, when issue joined on plea in abatement is found in favor of defendant, the suit shall not abate, but shall be proceeded upon to final judgment, as though commenced originally by summons alone. Now, the practice act provides that, in suits instituted by summons, they shall be brought, when the parties all reside in the State, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found. One of the parties must reside in the county where suit is brought in order to confer jurisdiction. If the matter alleged in the answer was true, it constituted a complete bar to all further proceedings in the case.

The judgment must, therefore, be reversed and the cause remanded. The other judges concur.

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Casby et al. v. Thompson et al.

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J. O. CASBY *et al.*, Defendants in Error, *v.* ALONZO THOMPSON  
*et. al.*, Plaintiffs in Error.

1. *Collections — Settlement of Accounts — Notice.* — The statute concerning the settlement of claims and accounts by collectors of revenue (Rev. Stat. 1865, p. 87, §§ 16, 19) is sufficient notice to the collector of the authority of the auditor to adjust his (the collector's) accounts and strike a balance, when he fails to exhibit them within the required time.
2. *Auditors — Writs of Prohibition.* — The duties of an auditor in proceeding against defaulting creditors, under such circumstances, are executive and ministerial, and not judicial; and, under the rule laid down in the case of *The State ex rel. West v. Clark County Court* (41 Mo. 44), a writ of prohibition against him will not lie.
3. *Writs of Prohibition — Meaning of phrase as used in the Statute.* — The words "writ of prohibition," occurring in the act concerning injunctions (Gen. Stat. 1865, ch. 167, § 24), are used in the general sense of a restraint by injunction, and not in their technical sense.
4. *Clerk — Authority.* — The clerk of a circuit court, in vacation, has no power to issue a writ of prohibition.

*Appeal from First District Court.*

R. F. Wingate, Attorney-General, for plaintiffs in error.

I. The settlement and adjustment of the accounts of the collectors of the revenue of the State are, by the statute, vested solely in the State Auditor. (Gen. Stat. 1865, p. 87, §§ 16, 17, 18, 19, and pp. 88, 89, §§ 24, 25, 26, 27, and 31.)

II. The Circuit Court had no jurisdiction over the State Auditor in the matter of the settlement of the accounts of the collectors of the State revenue and the issuance of distress warrants for the collection of balances found due by him from collectors. (See sections above cited; also, Const. Mo., art. 5, § 16.)

III. A writ of prohibition can only issue from a superior to an inferior court or tribunal to prohibit the doing of a judicial act over which such inferior court has no jurisdiction, and when such superior court is vested with jurisdiction over the subject of the act. (See *Prignitz v. Fisher*, 4 Minn. 366; *Board of Comm. v. Spitler*, 13 Ind. 235; *ex parte Braudlacht*, 2 Hill, 367; 14 La. An. 504; 36 Barb. S. C. R. 341; 9 S. & M. 623; 5 Pike, 21; 16 Eng. L. & Eq. 462; 7 Wend. 518; 7 Eng. 70.)



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IV. The issuance of the distress warrants by the auditor were purely and only ministerial acts; and the acts of the respondent, as sheriff, were only executive or ministerial, and not judicial, and a writ of prohibition will not be granted to prohibit the doing of such ministerial or executive acts. (The People *ex rel.* Onderdonk v. Supervisors of Queens county *et al.*, 1 Hill, 195.)

V. The law was notice to the collector of the time when his accounts were to be adjusted; nor does the law make it necessary that the collector should be present when the adjustment is had. It only requires the accounts and vouchers of the collector to be exhibited to the auditor; and if the collector should fail, neglect, or refuse, to exhibit his accounts and vouchers, when required by law, the auditor may proceed to ascertain the amount due without the presence of the collector. (Gen. Stat. p. 87, § 16; 36 Barb. S. C. R. 344; 38 Mo. 300.)

VI. The clerk had no authority to grant and issue the writ of prohibition in vacation, and simply upon filing the petition praying for the same in his office, without being ordered or directed so to do by the judge of his court. (1 Mo. 224; 2 Mo. 747. See form of writ of prohibition, No. 655; Tiff. & S., N. Y. Pr., 515; 3 Toml. Law Dict. 241.

*Adams, and Draffin, Hutchison & Muir*, for defendants in error.

I. The circuit court has jurisdiction by prohibition over all inferior tribunals and officers exercising judicial functions. (Com. Dig. title Prohib. A. 2, F. 1, 11; Bac. Abr. title Prohib. T. 1; Const. Mo. art. 6, §§ 1, 21; Thomas v. Mead, 36 Mo. 232; Howard *et al.* v. Pierce, 38 Mo. 296, and cases there cited.)

II. When the auditor of public accounts, in pursuance of the statute, makes a settlement between the State of Missouri and a collector of the revenue, he exercises judicial functions, and in effect pronounces a judgment in striking the balance, upon which judgment he is authorized, where it has been properly and legally found and made, to issue executions, called in the statute "distress warrants." (2 Bl. Com. book 3, p. 25; art. 3 of "An act to establish and regulate the treasury department," R. C. 1855, p. 1542; Gen. Stat. 1865, p. 87, §§ 16, 17, 18.)

III. The summary remedy before the auditor against collectors is a statutory proceeding, and can only be exercised by the auditor when the collector makes his appearance before him to make a settlement. (Gen. Stat. 1865, pp. 87, 88, 89, §§ 16, 17, 18, 26, and R. C. 1855, pp. 1542, 1544, 1545, etc.) If the auditor proceeds, without the presence of the collector and without notice, to make up balances and issue distress warrants, the proceedings are "*coram non judice*," and utterly void. (Caldwell v. Lockridge, 9 Mo. 358; Smith v. McCutchen, 38 Mo. 415; Durossett's Adm'r v. Hale, 38 Mo. 348; Janney v. Spedden, 38 Mo. 395; Story's Conf. of Laws, § 539.)

HOLMES, Judge, delivered the opinion of the court.

This appears to have been intended as an application to the Circuit Court of Cooper county for a writ of prohibition to forbid the State Auditor and the sheriff of said county from proceeding to execute certain writs of distress issued by the auditor against Andrew J. Barnes, the former sheriff and *ex-officio* collector of said county for the years 1862 and 1863, and the sureties in his official bond. The petitioners were the sureties. The petition was filed with the clerk in vacation, and the clerk issued a writ of prohibition.

At the next term of the court, the defendants appeared, and moved the court to dismiss the writ. Their motion being overruled, they filed a demurrer to the petition. The demurrer was sustained and the petition dismissed. The petitioners took a writ of error to the First District Court, where the judgment was reversed and the cause remanded, at the costs of the defendants in error, with directions to the Circuit Court to quash the writ and dismiss the petition. The defendants bring the case here from the District Court by writ of error.

It appears that the collector had failed to exhibit his accounts and vouchers to the auditor on or before the first Monday in January; that the auditor thereupon proceeded to adjust the account, and reported to the treasurer the balance found due; that the collector failed to pay the amount into the treasury within thirty days thereafter, together with two and a half per centum a month on the amount withheld; and that thereupon the auditor

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issued warrants of distress as required by law. (Gen. Stat. 1865, ch. 10, §§ 16-19, p. 87; R. C. 1855, p. 1542.) These warrants were issued on the 9th of January, 1867.

The petition alleged that the collector had never exhibited his accounts for settlement; that the account had never been audited, adjusted, and settled, in the manner prescribed by law, and that the auditor had proceeded in the premises without any notice being given to the said collector, and without his knowledge; that the collector had paid into the treasury all the revenue for which he was liable to account, and that nothing was due from him to the State. It assumes that the auditor, in issuing the warrants, had acted without the authority of law and contrary to law.

It appears to have been assumed by the petitioners that the auditor had no lawful authority to adjust the account and strike a balance without an exhibition by the collector of his accounts and vouchers for settlement, or without his presence, or without some special notice given to him. The law itself was sufficient notice for the collector, and he appears to have been in default. No facts are stated in the petition from which it can be seen that the auditor proceeded without the authority of law or contrary to law.

It is not deemed proper, upon this record, to go into a consideration of the questions which have been argued respecting the several remedies provided by statute against defaulting collectors and their securities, or concerning the proper course of proceeding in such cases by the auditor or by the parties interested. There is nothing in the record to call for a decision upon those matters. The laws themselves would seem to be very explicit.

It will be sufficient to say that, in a case like this, a prohibition will not lie. The duties of the auditor in this matter were executive and ministerial, and not judicial, in their nature. This question was considered in the case of *The State ex rel. West v. The Clark County Court*, 41 Mo. 44, and the principles there laid down may be taken as determining this case. The auditor was not a court exercising judicial power.

It is beyond all question that the clerk of the Circuit Court in vacation had no power or authority to issue a writ of prohibition. It seems to have been supposed that "the remedy by writ of

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injunction or prohibition," which is spoken of in the act concerning injunctions (Gen. Stat. 1865, ch. 167, § 24), refers to a prohibition of this nature. This is evidently a misconception. The word is there used in the general sense of a restraint by injunction, and not in the technical sense of a writ of prohibition. The clerk had no more authority to issue an injunction than a prohibition.

The defendants' motion to dismiss the writ should have been sustained. Without stopping to remark upon the propriety of the action of the court in term in proceeding to entertain the petition upon an appearance and demurrer by the defendants, as if it were then to be treated as a present application for a prohibition, it is enough for all purposes that the demurrer was sustained and the writ refused. We see no good reason why the judgment of the Circuit Court should have been reversed in the District Court at the costs of the defendants. There would have been equal propriety and more justice in an affirmance at the costs of the petitioners.

The judgment of the District Court will therefore be reversed, and the judgment of the Circuit Court affirmed in this court, at the costs of the petitioners, defendants in error here. The other judges concur.

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CHARLES HOPPER, Appellant, v. PLUMAN W. HARPER, Respondent.

Judgment affirmed.

*Appeal from Third District Court.*

G. W. Garland, for appellant.

McAfee & Phelps, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was an action for damages, commenced in the Polk Circuit Court on the 7th day of August, 1865, for injuries resulting from an assault and battery committed by the respondent in the fall of

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1861. The answer contained a general denial of the facts stated in the petition, together with a plea of the statute of limitations. The appellant obtained a verdict and judgment in the Circuit Court, which, upon an appeal taken to the Third District Court, was reversed and the cause remanded. The case is now here by appeal, and the record presents but one question to be considered. The statute limiting the time for bringing actions of this kind to two years is too plain and explicit to admit of any controversy whatever. That the cause of action in this case is within the statute, there can be no doubt, and the instructions asked by the respondent should have been given.

The decision of the District Court, reversing the judgment of the Circuit Court, must therefore be affirmed. The other judges concur.

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M. J. HUBBLE, Appellant, v. JAMES VAUGHAN *et al.*, Respondents.

1. *Equity — Statutory Powers.* — Where an equitable defense to an action amounted to nothing more than the showing of an incomplete or imperfect execution of a statutory power, there was no ground for the interference of a court of equity.
2. *Mortgages — Outstanding Title — Forfeiture.* — A mortgagee of land, who was in possession after the condition of the mortgage was broken, could defend successfully against the mortgagor, or any person claiming under him, so long as the debt remained unsatisfied; and a purchaser of the land, under a judgment against the mortgagor, after the execution of the mortgage, would acquire nothing more than the equity of redemption.
3. *Fraud — Evidence.* — In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.

*Appeal from Greene Circuit Court.*

Plaintiff claimed the property in controversy by virtue of two judgments rendered in his behalf, against John McHenry, in 1855. These judgments, as appeared in evidence, were satisfied by a sale of the property on execution. Plaintiff became the purchaser, and received a deed from the sheriff of Greene county, dated in 1864, conveying to him McHenry's interest in the premises.



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Defendant claimed under a mortgage of the same property, given by McHenry to John Bailey, in 1854, to secure certain notes, which the latter paid, and took possession of the mortgaged property soon after the execution of the mortgage. From that time he remained in possession till 1863, when the property was sold under an execution against Bailey, and defendant purchased it, but received no deed from the sheriff.

Most of the facts necessary to a clear understanding of the case are set forth in the opinion of the court.

*Sherwood & Lindenbower, and Ewing & Holliday, for appellants.*

I. The motion of the plaintiff to strike out part of defendant Vaughan's answer should have prevailed. The part sought to be stricken out set up the defective or incomplete or imperfect execution of a statutory power as an equitable defense. (*Moreau v. Detchemendy*, 18 Mo. 522; *Moreau v. Branham*, 27 Mo. 351; *Haley v. Bagley*, 37 Mo. 363; *Hiney v. Thomas et al.*, 36 Mo. 377; *Webb v. Cochran*, 4 Sandf. 653.)

II. To defeat a plaintiff's recovery in ejectment by showing an outstanding title in a third person, such outstanding title must be a present subsisting and operative title, and such an one as the owner could recover on were he asserting it in an action against the defendant. (*McDonald v. Schneider*, 27 Mo. 410.)

*Phelps & Baker, for respondents.*

I. Plaintiff in ejectment can only recover upon the strength of his own title.

II. Title of mortgage after forfeiture is such an outstanding title as will prevent a recovery in ejectment. (*Meyer v. Campbell*, 12 Mo. 603.) A mortgagee may maintain an action of ejectment against the mortgagor and those claiming under him. (*Sutton v. Mason*, 38 Mo. 120; *McCormack v. Fitzsimmons et al.*, 39 Mo. 24; *Walcoess v. McKinney's heirs*, 10 Mo. 229; 1 Hill on Mortg. p. 134, §§ 15, 16, 17, 18; p. 140, § 12; p. 149, note; p. 229, §§ 26, 27.)

FAGG, Judge, delivered the opinion of the court.

This was an ordinary action of ejectment to recover the possession of parts of two lots situate in the city of Springfield. The cause seems to have been tried upon the separate answer of Vaughan—one of the defendants disclaiming any interest in the property, and the other not appearing.

In addition to the general issue, the answer contains a lengthy, detailed statement of facts, which it is claimed constituted an equitable defense to the action. This statement proceeds to show the defendant Vaughan's possession of the premises by virtue of a sale and conveyance made by the sheriff of Greene county under an execution levied upon the premises in question as the property of one Joshua M. Bailey. It is further alleged that in the month of October, 1854, one John McHenry, being the owner of the said property, executed a deed of mortgage of the same to Bailey, for the purpose of securing him against any liability as his surety upon a note to one J. I. Campbell for the sum of \$2,250. After the note became due, it was paid off by Bailey.

This mortgage was duly recorded; and a short time after the payment of the note the possession of the premises was delivered to Bailey, who continued to hold the same down to the time when the defendant Vaughan became the purchaser thereof, except during the periods when the same was held by the military authorities. It is also alleged that a suit was instituted by Bailey to foreclose his mortgage, upon which there was a judgment, and the property sold in the month of March, 1856, he being the purchaser thereof for the sum of \$495, but that no deed had been executed to him by the sheriff of said county. The remainder of the note paid by Bailey was alleged to be still due and unpaid. There are some other matters stated, not material in the consideration of the case, and therefore not necessary to be referred to. The answer of the defendant then concludes with the following prayer: "that judgment be rendered in his favor, and that by a decree of this court the plaintiff be forever barred and precluded from setting up a title to said lots against this defendant and those claiming under him."

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The plaintiff made an unsuccessful effort to have all of the answer of defendant stricken out, except so much as contained a plea of the general issue, together with the admission that the lots in question had formerly belonged to McHenry.

The action of the Circuit Court, in this particular, presents the first point for our consideration.

It is insisted on the part of the appellant that error was committed, in the fact that the equitable defense amounted to nothing more than the showing of an incomplete or imperfect execution of a statutory power. If that be true, then certainly it should not have been treated as a defense. The statute having furnished a proper remedy in cases of that sort, there would be no ground for the interference of a court of equity.

But we do not understand that to be the true interpretation of the answer. The prayer does not insist upon an absolute decree of the title in the defendant, and a divesting of all the right, title, and interest which may have been vested in McHenry or those claiming the equity of redemption under him. All that portion of the answer which alleges a foreclosure and sale of the mortgaged premises may be excluded from consideration, as indeed it seems to have been at the trial, and still the facts stated were not inconsistent with the prayer of the defendant or with the general issue first pleaded. We cannot perceive any violation of the rules of pleading that would authorize us to treat the action of the Circuit Court as erroneous. We can see no good reason for the statement of facts contained in this second defense. It might have been treated as mere surplusage; for all that was material in it, for the purposes of this action, could have been given in evidence under the general issue.

The plaintiff's title was simply the deed of the sheriff of Greene county, executed to him in the year 1864. The levy and sale were made under two executions issued from the office of the clerk of the Circuit Court of that county, against John McHenry, upon judgments rendered in the year 1855. The only interest which McHenry himself could have claimed as against Bailey, the mortgagee, was the equity of redemption. The legal estate had passed by the mortgage. The mortgagee, however, had acquired some-

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thing more than the naked legal title. He was in possession of the property after the condition of the mortgage was broken, and therefore in a situation to defend successfully against the mortgagor, or any person claiming under him, so long as the debt remained unsatisfied. This plaintiff acquired nothing more by his purchase than the equity of redemption. He could assert no greater interest in the property so long as the mortgage debt remained unsatisfied. It was, then, an outstanding title against McHenry, or any party claiming under him, subsequent to the execution of the mortgage. The defendant Vaughan's possession was acquired in 1863, by virtue of a sale made by the sheriff of that county under an execution levied upon the lots in question as the property of Joshua M. Bailey. As to whether this possession was rightful, or whether Bailey's interest was the proper subject of a levy and sale, or not, can cut no figure in this case. The mortgage deed, with the debt secured by it, unsatisfied, constitutes a good bar to plaintiff's action. This view of the case proceeds upon the theory that there was no fraud in the execution and acceptance of the mortgage by McHenry and Bailey. The good faith of the transaction was attacked by the plaintiff, and we proceed now to examine the errors complained of in reference to this branch of the case. The cause was tried by a jury; and the facts, so far as they relate to the execution of the mortgage and the existence of the debt, are embraced in a small compass.

In the investigation of questions of fraud, much latitude must be allowed. It is difficult to lay down any rule so specific in its terms as to make it applicable to all cases that may arise. All of the inquiries relating to the existence of the debt secured by the mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, were proper, and the plaintiff seems to have had the full benefit of all the testimony given upon those points.

So much as related to the purchase and sale of the negro woman was entirely disconnected with this transaction, and could throw no light upon it whatever. The court committed no error in excluding it.

That Bailey actually paid the debt due by McHenry to Camp-

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bell, and that nearly the whole of it, with interest down to the time of the trial, still continued in existence, appears to be uncontradicted by the evidence. Without examining in detail the instructions given and refused by the Circuit Court, it is enough to say that they presented fairly and with sufficient clearness the points upon which the jury was required to pass. The verdict acquitted the parties to the mortgage of any fraud in that transaction, and we find nothing in the facts proved to authorize this court in disturbing it.

The judgment of the Circuit Court was affirmed upon an appeal to the District Court. The cause is now brought here by appeal from that court, and for the reasons above stated its judgment will be affirmed. The other judges concur.

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WILLIAM T. SEELY'S ADM'R, Plaintiff in Error, v. JAMES P. BECK, Defendant in Error.

1. *Co-securities — Risks Assumed.* — It may be said, as a general rule, that co-securities undertake to assume the same risks and responsibilities, and neither can gain any advantage over another, but all subject themselves to the same liabilities.
2. *Sureties — Rights.* — Sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify themselves; and courts of equity hold them entitled, upon payment of the debt due by their principals to the creditor, to have the full benefit of all the collateral securities held by the creditor.
3. *Co-securities — Agents.* — Where A. and B. were co-securities on the bond of an administrator who became insolvent, and A. as security was compelled to pay the amount in default, the fact that prior to the execution of the bond B. had entered into an agreement with the administrator to act as his agent in receiving and paying out moneys belonging to the estate of the deceased, in consideration of the payment to him of a portion of the commissions allowed the administrator by court, does not deprive B. of his position as surety and render him liable to A. as principal on the bond. That he was entitled by law primarily to administer, and waived his rights in favor of a public administrator, or that he had an interest in the estate, will not alter the case.
4. *Agent — Partner.* — Under such circumstances, B. would be liable only upon the assumption that the agreement created a partnership between himself and the administrator, and no partnership can exist in the office of administrator.



*Error to Fourth District Court.*

*Adams*, for plaintiff in error.

I. On principles of equity, independent of contract, the appellant, although ostensibly a surety for Warfield, was, as between himself and the other sureties, a principal, so far as the administration of the Beck estate was concerned. Whether a party to an obligation is a mere surety or a principal, depends upon the question whether such obligation was made for his benefit. In this case, the two official bonds were made for the joint benefit of the appellant and Warfield. They were made expressly for the purpose of administering the Beck estate, and in order that the appellant might administer them in the name of Warfield as public administrator, and thereby receive two-thirds of the profits or commissions to be allowed in the name of Warfield. These facts constitute the appellant a principal as between himself and the other sureties. (See 1 Story on Eq. §§ 493-498; *McPherson v. Talbott*, 10 Gill. & John. 499; *Mayhew v. Crockett*, 2 Swanst. 193; *Turner v. Davis*, 2 Esp. 478; *Deering v. Earl of Winchelsea*, Cox Ch. 318, and 2 Bos. & Pul. 270; *Sterling v. Forrester*, 3 Bligh, 575-596; *Craythorne v. Swinburne*, 14 Ves. 159; *Onge v. Truelock*, 2 Mol. 31; *Copis v. Middleton*, 1 Turn. & Russ. 224; *Hodgson v. Shaw*, 3 My. & Keen, 191; *ex parte Gifford*, 6 Ves. 805; *Campbell v. Mesier*, 4 Johns. Ch. R. 334-338; *Higgins v. Dellinger*, 22 Mo. 397; *Rice v. Morton*, 19 Mo. 285.)

II. As the bonds were made for the benefit of the appellant, if he had paid the whole deficit he could not have demanded contribution from the respondent or the other sureties. As this could not be done, by parity of reason, he must save them harmless from the results of an obligation made for his own benefit. (See the authorities above cited.)

*Prewill*, for defendant in error.

I. This is not a question of contribution between sureties. There is no allegation in plaintiff's petition that defendant had not contributed his share, or that he had received any indemnity

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which he was bound to share with his co-securities. The contract arising from the bond is expressly a contract of co-securityship. If defendant, then, is liable as principal, it must be by virtue of some act or contract outside of the bond, raising an obligation contrary to and in contravention of that raised by the express terms of the bond. If defendant had agreed to indemnify plaintiff's intestate, he would be liable to him whether defendant signed the bond or not, and not because he signed the bond; and if he received any property from Warfield, to hold for the benefit of Seely, he would be liable for it whether he signed the bond or not; but there is no allegation of either of these facts in plaintiff's petition. The agreement does not make him a partner of Warfield, or a principal in the contract in any way, but only an agent of Warfield, acting under his directions and receiving part of Warfield's commission for his compensation. (*Burckle v. Eckhart*, 1 Den. 337; *Berthold et al. v. Goldsmith*, 24 How. 526; *Blake v. Cole*, 22 Pick. 97; *Bradley v. White*, 10 Met. 303; *Denny v. Cabot*, 6 Met. 82; *Vanderburgh v. Hull*, 20 Wend. 70; *Tom v. Goodrich*, 2 Johns. 218.)

II. The law of contribution does not make a co-surety a principal because he receives an indemnity from his principal; it only requires him to hold it for their joint benefit. (Lead. Cas. in Eq. 119; 1 Story on Eq. 574, § 499; *Moore v. Moore*, 4 Hawks, 358; *Carpenter v. Kelley*, 9 Ohio, 106; *Agnew v. Bell*, 4 Watts, 31.)

WAGNER, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity, brought by the plaintiff as administrator of Seely, to recover a sum of money alleged to have been paid by Seely as surety for the defendant.

It seems that Elisha N. Warfield, who was public administrator of Cooper county, administered on the estates of Preston Beck, Jr., and J. J. Beck; that the defendant was entitled by law to administer on said estates, but that he voluntarily waived that right and agreed to let Warfield take charge of the same. The Probate Court of Cooper county required Warfield to give an additional bond in each estate before it would allow him to administer on and

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take charge of the assets. Seely and Jas. P. Beck, with others, signed these bonds, as securities. Prior to the execution of the bonds, Beck, the defendant, and Warfield entered into an agreement reciting that Beck was entitled to administer on the estates by law, but that he was willing the estates should be administered on by Warfield as public administrator.

It was then further agreed between the parties that Beck should do all he could, under the directions of Warfield, to aid him in the administration of the estates, and assist, under his instructions, in loaning or distributing the assets under the order of the Probate Court. And Warfield agreed to appoint, and did appoint, Beck his agent in Missouri, to receive and distribute the moneys that might be sent from New Mexico, belonging to the estate of P. Beck, Jr., for which services he was to be paid a reasonable commission. Warfield was to charge for his services as administrator the usual commissions; out of which, after the payment of all such expenses as were not otherwise allowed by the Probate Court, he was to allow and pay Beck for his services two-thirds of the commissions, and retain one-third for himself.

Warfield, after administering on the estates, became insolvent, and was a defaulter to a considerable amount, which the securities were obliged to pay. This action is now brought to charge Beck as a principal on the bond, and recover the money so paid by the sureties. The defendant, in the Circuit Court, demurred to the petition, and the demurrer was overruled. The cause was then appealed to the Fourth District Court, where the judgment of the Circuit Court was reversed, and the plaintiff has prosecuted his writ of error to this court.

This is not a question of contribution between sureties, but it is an attempt to hold a person who signed as a surety a principal in the bond. It may be said, as a general rule, that sureties undertake to assume the same risks and responsibilities, and neither can gain any advantage over another, but all subject themselves to the same liability. It has, therefore, been held that where one surety, without the knowledge of his co-surety, by previous arrangement with the principal debtor, received one-half of the sum borrowed, he was not entitled to contributions from

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the other surety, who might have undertaken the responsibility in the confidence that his associate was equally with himself exposed to risk. (*McPherson v. Talbott*, 10 Gill. & John. 499.) Sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify themselves; and courts of equity hold them entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities held by the creditor. (1 Story's Eq. Jur. § 499; *McCune v. Belt*, 38 Mo. 281; *Hayes v. Ward*, 4 Johns. Ch. 123.)

But these established principles furnish no aid in determining the main question, whether the defendant Beck can be deprived of his position as surety and made to assume the character of a principal. The case of *Higgins v. Dellinger*, 22 Mo. 397, is greatly relied on by the plaintiff in error as supporting his theory and maintaining his views.

But I cannot see that it has any bearing or controlling influence in the present case. In that case it was merely decided that a party who is compelled to pay a note which he signed as security for another, who gave it for money borrowed by him as *agent* for a third party, may recover the amount directly from him for whom the money was borrowed; and it makes no difference that the agent did not disclose his agency, or that the money was loaned and the note signed by the security upon his individual credit. This is only a declaration of the familiar and admitted rule that although the agent may bind himself personally, yet this by no means shows that the principal may not also be bound as a party to the contract through his agent. But how can it be said that the defendant impressed himself with the character and obligations of principal in the bond?

It does not appear that the bond was made for his benefit, nor had he any control over the assets which came into the hands of the administrator, only so far as the administrator saw proper to employ him as an agent. That he was entitled by law primarily to administer, or that he had an interest in the estates, cannot operate to his disadvantage; for when the public administrator took charge of the estate he alone was then responsible and liable

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for the acts of any agent which he chose to employ. The securities assumed the risk, and undertook to be responsible for the acts of Warfield, and at the same time invested him with a capacity to do all things touching the matters of administration, which necessarily included the transaction of some of the business through agents and attorneys. I am wholly unable to see that any other relation subsisted between Warfield and Beck than that of principal and agent, and it is not made to appear that the appointment of Beck operated as a fraud on the other securities, or that they suffered injury through him.

The action, then, can only be maintained upon the assumption that the agreement created a partnership between Warfield and Beck, and it is a sufficient answer to say that there can be no partnership in the office of administrator.

The judgment of the District Court is affirmed. The other judges concur.

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WILLIAM HERRYFORD, Appellant, v. THE AETNA INSURANCE CO.,  
Respondent.

1. *Corporations—Citizenship.* — A corporation may be a citizen of a State, for the purpose of suing and being sued in the courts of the United States.
2. *Causes—Application for removal to U. S. Courts—Effect.* — When a corporation makes an application for a removal of the cause to the United States Circuit Court, in the manner required by the act of Congress, it is error in the State Court to proceed further in the matter, and any subsequent step is *coram non judice*.
3. *Statute of Insurance—Intent and Effect.* — It was not the intention of the statute of this State concerning foreign insurance agencies (R. C. 1855, p. 885, § 1, and Gen. Stat. 1865, p. 402, § 3) to preclude the party from making this application. Its proper effect is merely to make the service of process on the agent of the company in this State binding on the corporation, for the purpose of giving the court jurisdiction over the party.
4. *Statute of Insurance—Foreign Agency—Process.* — This statute gives all the facilities for serving the ordinary process of law upon the foreign corporation which takes up its residence in this State, by establishing an agency here under its provisions, that would exist in reference to a corporation chartered by the legislature of this State.



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5. *Corporations — Citizenship in other States.* — Although a corporation may act by agents beyond the bounds of the State which created it, and become, constructively, resident of this State under the statute, not only for the purpose of suing and being sued, but for the purposes of taxation in respect to property found here, yet it does not follow that the corporation must therefore cease to be a citizen of another State, within the act of Congress of Sept. 24, 1789.
6. *Foreign Insurance Agencies — Pleading—Waiver.* — Under the first section of the act concerning foreign insurance agencies (R. C. 1855, p. 885, § 1), a corporation has the same right to remove a suit brought against it, into the courts of the United States, that any other citizen of another State would have when sued in this State. Nor did it waive this right by answering and proceeding to trial after such removal had been refused. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction.

*Appeal from Fourth District Court.*

*Adams & Shackelford*, for appellant.

I. The defendant was a foreign corporation, which could only do business in this State by complying with our statutes requiring them to concede the right to be sued in the courts of this State and to abide the issue of such suit. (R. C. 1855, p. 884.) After obtaining this privilege, the defendant became and was in this respect a domestic corporation, and was estopped from transferring this case to the courts of the United States. It thereby waived the right, if it ever had any, to resort to the United States courts. The right to appeal to those courts, from another court of competent jurisdiction, is one which the party had a right to waive, and did waive; and it would be a violation of good faith, and against public policy, to suffer the defendant to withdraw the case from the State court. (See *Reichard v. Manhattan Ins. Co.*, 31 Mo. 518; *McAllister v. Penn. Ins. Co.*, 28 Mo. 214.)

II. In this case the defendant not only had no right to resort to the courts of the United States in the first instance, but, after he had made the attempt to do so and failed, he submitted himself fully to the jurisdiction of the State court by answering and going to trial upon the merits. By pleading and going to trial upon the merits, he has lost all right now to raise the question of jurisdiction.

III. But the defendant never had any such right. This law of the United States applies to aliens and citizens of other States,

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and not to corporations which are not citizens. (Judiciary Act of U. S. of 1789, § 12; see 16 Pet. 103; U. S. Constitution, art. 3, § 2.)

*Prewitt*, for respondent.

I. The court erred in refusing to send the case to the U. S. Circuit Court. The law of Congress is peremptory. The State can make no law to deprive the federal courts of their jurisdiction, or the laws of Congress of their force. (Brightley's Dig. 128; Act 24th Sept., 1789, § 12; U. S. v. Holliday, 3 Wal. 419.) And any agreement made in contravention of said law is against public policy, against the law, and void. (Reichard v. Manhattan Life Ins. Co., 31 Mo. 518; 2 Story's Eq. § 1457; Addison on Cont. 96.)

II. The petition of plaintiff is in the nature of an appeal, and is not waived by answering to the merits or trying the cause. All the subsequent proceedings were *coram non judice*. (16 Pet. 97; 15 How. 198; Mechanics' Bank v. N. Y. & N. H. R.R. Co., 3 Kirnan, N. Y. 599; Marshall v. Baltimore & Ohio R.R. Co., 16 How. 325.)

HOLMES, Judge, delivered the opinion of the court.

The plaintiff brought suit against the defendant in the Circuit Court of the county of Howard. Service was had upon an agent of the defendant, who had charge of an agency office of the company in said county. The defendant appeared to the action, and presented to the court a petition and bond praying for a removal of the cause into the Circuit Court of the United States for the District of Missouri, under the act of Congress of the 24th of September, 1789, and alleging that the plaintiff was a citizen of the State of Missouri, and that the defendant was a corporation duly incorporated under the laws of the State of Connecticut, having its principal place of business at Hartford, in that State, and was a citizen thereof, and that the stockholders were not citizens of this State; and that the matter in controversy exceeded the sum of five hundred dollars. The plaintiff objected that the corporation was not a citizen of another State within the

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meaning of the act of Congress, and that the defendant was estopped from making the application by reason that, being a foreign insurance company, and having established an agency in this State under our laws, it had voluntarily subjected itself to the jurisdiction of the courts of this State as a condition precedent to the right of transacting business here, and could not divest the court of jurisdiction by this proceeding for a removal of the case to the Circuit Court of the United States, under the act of Congress; and that the policy was issued by an agent of the defendant in this State, under the authority granted by the laws of the State. These objections were sustained, and an order of removal was refused. The defendant excepted, filed an answer, and proceeded to trial. The plaintiff recovered a verdict and judgment, from which the defendant appealed to the District Court, where the judgment was reversed and the cause remanded, for the reason that the court erred in refusing to make the order of removal; and the case is brought by appeal to this court.

That the corporation may be a citizen of a State, for the purpose of suing and being sued in the courts of the United States, must be considered as settled. (Marshall v. Baltimore and Ohio R.R. Co., 16 How. 314.) When the party makes an application for a removal of the cause, in the manner required by the act of Congress, it is error in the State court to proceed further in the matter, and every subsequent step is *coram non judice*. (Gordon v. Longest, 16 Peters, 97; Kanouse v. Martin, 15 How. 198.) All further proceedings are erroneous. The laws of this State could not withdraw a citizen of another State from the operation of the act of Congress, nor deprive him of this right of removal of his case to the federal court. (United States v. Holliday, 3 Wal. 407.) It does not appear to have been the intention of the statutes of this State on the subject of foreign insurance agencies to deprive the party of this right. There is nothing in their provisions to preclude him from making this application. Their proper effect is merely to make the service of process on the agent of the company in this State binding on the corporation, for the purpose of giving the court jurisdiction over the party. Such service is to be "deemed a service upon the

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company," and "shall authorize the same proceedings in such suit as in case of other suits in said courts." (Gen. Stat. 1865, ch. 90, § 3.) If service were had upon an individual citizen of another State, being found within this State, in such manner as to give the courts of the State jurisdiction over him, there could be no doubt of his right to avail himself of this privilege of removal of his case into the federal courts, nor that, if he did not claim the right, the proceedings and judgment would be binding upon him as in other cases.

This corporation had filed with the clerk of the County Court the resolution of the board of directors, as required by the statute. It is this, and not merely the consent of the defendant, that gives the courts jurisdiction. It has been decided that this statute gives all the facilities for serving the ordinary process of law upon the foreign corporation which takes up its residence in this State, by establishing an agency here under its provisions, that would exist in reference to a corporation chartered by the legislature of this State; that it would not be liable to attachment as a non-resident, and that, having such agency and a place of business here, "it ceases to be, for all the purposes of this law, a foreign corporation." (Farnsworth v. *Terre Haute, Alton & St. Louis R.R. Co.*, 29 Mo. 75.) In the case of *The City of St. Louis v. The Wiggins Ferry Co.*, 40 Mo. 580, it was held that although a corporation is a citizen of the State in which it is created, and must dwell in the place of its creation, and can have no legal existence beyond the dominion of the government which created it, yet it may act by agents beyond the bounds of that State, and become, constructively, resident in this State under the statute, not only for the purpose of suing and being sued, but for the purposes of taxation in respect of property found situate here. But it does not follow that the corporation must therefore cease to be a citizen of another State, within the meaning of the act of Congress in question.

There is nothing in the acts of the defendant that can have the effect to estop it from asserting this right. It had subjected itself to the jurisdiction of our courts under the statute laws. It submitted to this jurisdiction by appearing to the suit. It has the

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same right to remove the case into the courts of the United States that any other citizen of another State would have when sued in this State. It has made no contract by which this right could be divested. In *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518, it was held that an agreement in a policy to waive the right to sue in our courts, and sue only in the courts of the State where the company was incorporated, was void, both as being against public policy and as being in contravention of our laws relating to foreign insurance companies. There was no such agreement in this case. Nor did defendant waive the right by answering and proceeding to trial after his application had been refused. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction. (*Broom's Max.* 102.) The defendant was not bound to answer, and he might have refused to answer. (*Kanouse v. Martin*, 15 How. 209.) Having placed his exception to the action of the court in refusing his application on the record, he has a right to have that error corrected in this court.

The judgment of the District Court will be affirmed and the cause remanded to the Circuit Court for further proceedings. The other judges concur.

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JOHN ELLIS, ADM'R OF THE PARTNERSHIP EFFECTS OF LAMME  
et al., Appellant, v. JOSIAH W. LAMME, Respondent.

1. *Pleadings — Exceptions.* — Where a plea in abatement, and demurrer, were both overruled, and defendant was permitted to file his answer, and the cause proceeded to trial on the merits, without objection or exception, questions concerning the pleadings ruled upon by the court were afterward wholly irrelevant.
2. *Deeds of Trust — Notes — Priority of Payment — Special Contract.* — The principle of law that, where a deed of trust secures several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in which they mature, can have no application to a case where the parties have specially agreed that payments shall be made transversely, and that the note last falling due shall have the priority of lien. And it does not alter the case that, by a provision of the deed, the grantor was expressly authorized to pay off the note first maturing at any time. This provision does not empower him to use the property encumbered by the trust for that purpose, without the consent or approbation of the securities upon the last maturing note.



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Ellis, Adm'r of the partnership effects of Lamme et al., v. Lamme.

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*Appeal from Fourth District Court.*

*Prewitt & Sheley*, for appellant.

*Reed*, and *Rollins*, for respondent.

I. Under the deed of trust offered in evidence, the defendant had a first lien on all the goods, merchandise, and effects therein conveyed, for the repayment to him of any sum he might be required to pay upon the note on which he was security; and the proceeds of said trust property, no matter when or by whom the same were realized, collected, or received, should have been applied: 1st, to the payment of the expenses of the trust; 2d, to the payment of the note on which defendant was security; and neither the plaintiff nor the said W. W. Lamme had the legal right to apply any part of the avails arising from said trust property, on the individual note of said W. W. Lamme, until the secured note was first paid off and discharged.

WAGNER, Judge, delivered the opinion of the court.

The question raised and argued by counsel in regard to the pleading is irrelevant and wholly beside any issue in the case; for after the decision of the Circuit Court, with respect to the demurrer and the plea in abatement, the defendant was permitted to file his answer, and the cause proceeded to trial on the merits, without objection or exception.

There was no substitution or novation of parties within the meaning of the rule raising an assumpsit in such cases. (*Manny v. Frasier*, 27 Mo. 419; *Edgell v. Tucker*, 40 Mo. 523.) But this question is immaterial and unimportant; as the whole matter, as presented by the record, essentially depends upon the construction to be given to the deed of trust. The deed of trust was given to secure the payment of two promissory notes made and executed by W. W. Lamme to plaintiff for \$6,500 each. The first was made by Lamme alone, and due twelve months after date; the other was executed by Lamme, with defendant and Rollins as securities, and due and payable two years after date. By agreement of parties, and by the express terms of the deed, the proceeds of the

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property were to be appropriated: 1st, to the payment of the costs and expenses of executing the trust; 2d, to the payment of the note specified on which defendant and Rollins were securities; and 3d, to the payment of the note due to the plaintiff and executed by Lamme alone.

The principle of law laid down in *Mitchell v. Ladew*, 36 Mo. 526, that where there is a deed of trust securing several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in which they mature, can have no application here. Such would be the principle of law where the parties had made no special agreement; but in the present case the parties have contracted that the payments shall be made transversely, and that the note last falling due shall have the priority of lien. From a careful reading of the whole instrument, there can be no difference of opinion as to the real intention of the parties. It is evident that the first and primary object was to make safe and fully indemnify the securities in the second note.

All parties were fully apprised of this fact; the plaintiff was one of the parties entering into the agreement, and he is in no position to either dispute its legal effect or to attempt to change the rights of the sureties. But it is urged for the plaintiff that, by a provision of the deed of trust, Lamme, the grantor, was expressly authorized to pay off the note to the plaintiff at any time.

This is true. But was he empowered to use the property encumbered by the trust for that purpose, without the consent or approbation of the securities? Most assuredly not. Such a construction can only meet favor by violently taking one single sentence and isolating it from the whole context; but when it is construed with the other parts of the deed of trust, the interpretation attempted to be placed upon it is entirely inadmissible. The deed provides that Lamme, the grantor, shall be fully authorized to pay off and discharge, at any time he may see fit, the note to Ellis, the plaintiff, and that Ellis shall allow him a credit for any payment he may make, with interest at the rate of ten per cent. But this provision is nothing more than an agreement between the parties—the grantor and the plaintiff—that the note may be paid before maturity, and in consideration of such pay-

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ment the plaintiff will allow ten per cent. on all amounts so paid. There is no agreement that the advanced payments shall be made out of the trust fund, or goods which are covered by the lien. Indeed, the tenor of the whole instrument discountenances this idea. There is nothing to show that anything was intended to be appropriated for this purpose, other than what the grantor might raise by his own individual means, independent of the property included in the deed of trust. This view fully disposes of the whole case; as the record shows that the property attached, and which has been sold by order of court, is insufficient to pay off the note on which defendant and Rollins are sureties, and on which they had the prior lien.

My conclusion, therefore, is that the Circuit Court misconstrued the meaning of the deed of trust, and that its judgment was rightfully reversed in the District Court.

The judgment of the District Court is affirmed, and the cause remanded to the Circuit Court, to be proceeded with in conformity to this opinion. The other judges concur.

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ELIAS R. BARTON *et al.*, Appellants, *v.* THE HOME INSURANCE COMPANY OF NEW YORK, Respondent.

1. *Insurance Policies—Causes of Exclusion—Construction.*—A policy of insurance contained the following clause: "Provided, always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or of any loss by theft at or after the fire:" *Held*, that the clause of exclusion was intended to cover acts of spoliation or burning committed by an army of invasion or rebellion, even when performed without any direct commands from the superior officers. The real question to be settled in determining the meaning of the clause is, did the fire happen, or the loss occur, by reason of, or in consequence of, the military and usurped power of the rebels, and were they the proximate cause of the burning and destruction of property?

*Appeal from Howard Circuit Court.*

*Adams & Shackelford*, and *R. F. Wingate*, for appellants.

- I. The plaintiffs' hemp was stored in a warehouse in Glasgow, within the military lines of an army then in absolute possession

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of the place, under regular officers and leaders, constituting a part of the armies of the late rebellion. This army was a "usurped power," within the meaning of the policy. To shield itself under the defense that the plaintiffs' hemp was burned by means of this usurped power, it was incumbent on the defendant to prove that the usurped power was the proximate cause of the loss; and to do this it was necessary to show that the hemp was set on fire by the authority of that usurped power. (Ellis on Life & Fire Ins., Shaw's ed., 103-109; Drinkwater v. The Corporation of the London Assurance, 2 Wil. 363; Langdale v. Mason, 2 Park. 657, 7th ed.; 2 Marsh. on Ins. 793.)

*Draffin, Hutchison & Muir*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action upon a policy of insurance for \$10,000, issued by defendant to plaintiffs, on a lot of hemp stored in a warehouse belonging to B. W. Lewis, in the city of Glasgow, in Howard county, in this State. The hemp was destroyed on the 17th day of October, 1864, by fire, while an armed and organized force of the rebel army held military possession and control of the place. The evidence shows most clearly that when, on the 15th day of October, the national soldiers were overpowered and compelled to surrender to the rebels, the latter force held absolute and exclusive possession of the place till the evening of the 17th day of the month, and that their forces had not evacuated the town till after the fire had consumed the hemp. As to the origin of the fire, whether it occurred by the act of the rebel soldiers or was communicated by their camp-fires, there is some doubt, and we do not propose to discuss it, as it properly belongs to the province of a jury. It is certain, however, that there is no evidence that the burning was authorized by an order from the commander of the forces. It appears from the record that the citizens were badly frightened, and that the rebel guard, stationed near the warehouse, would not permit them to go near it. The policy of insurance contains this clause: "Provided, always, and it is hereby declared, that this corpora-

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tion shall not be liable to make good any loss or damage by fire which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or of any loss by theft at or after the fire." The defendant contends that it is exempted from the payment of the loss by reason of the above-recited proviso; but it is argued by the plaintiffs that, to constitute an exemption in consequence of usurped power, it must be shown that the property was destroyed by the order or direction of the officer commanding the rebel army. We lay out of view all that part of the case, and the instructions given in relation to riot, as there is nothing to show that the property was burned by reason of a riot, either in the manner contemplated by the policy or by law. If the defendant is not liable, it is on account of the exclusion, in the policy, of loss happening by means of military or usurped power.

The whole case turns upon the construction which shall be given to these words. With respect to the rules of construction in policies of insurance, except in cases relating to warranties, it is the duty of the court to adopt the construction that, in their judgment, shall best correspond with the real intentions of the parties. As far as our investigations have led us, this is a case of new impression in this country; and the reason is manifest, because we have had but one great rebellion in the whole period of our history which would enable the clause to have any force or application. In the case of *Drinkwater v. The Corporation of the London Assurance Co.*, 2 Wils. 363, the covenant upon a policy of insurance against fire provided that the defendants should not be liable in case the house was burnt by reason of any invasion, foreign enemy, or any military or usurped power. The house was burnt by a mob, and it was held not within the proviso. Wilmot, C. J., in his opinion, said: "My idea of the words, 'burnt by usurped power,' from the context, is that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion when armies are employed to support it." Now, the contract was made between the parties with reference to the usual risks incurred in ordinary times. The extraordinary hazards arising from insurrection, invasion, military and usurped power,



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when the arm of the civil magistrate is powerless, are expressly guarded against and excluded. It would be doing violence to the language which the parties have seen fit to use, and would be also a strained and unnatural interpretation of their meaning, to say that the insurer would be liable in all cases, except where he could show that the burning took place by order of the officer immediately commanding the rebellious forces. The language in the proviso is, that the company shall not be liable for any loss or damage by fire which may happen by means of invasion, military or usurped power, etc. If the military or usurped power, or the invasion, was the means that occasioned, or the proximate cause of, the loss, then the company cannot be held liable within the terms of its contract. An army of invasion or engaged in rebellion is liable to commit acts of spoliation or burning without any direct commands from the superior officers, and the insurer certainly never intended to incur any risk by reason of such acts. To exonerate the defendant from its liability, it is not material how or in what way the fire originated, provided it was within the range of any one or more of the excepted causes. The real question is, did the fire happen or the loss occur by reason of or in consequence of the military and usurped power of the rebels being in Glasgow, and were they the proximate cause of the burning and destruction of the property? If so, the judgment should be for the defendant; otherwise, for the plaintiff. It will be unnecessary to notice the instructions in detail, as the cause will have to be retried in accordance with the above views.

The judgment of the District Court will be affirmed and the cause remanded to the Circuit Court, to be proceeded with in conformity to the foregoing opinion. The other judges concur.

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D. P. HARRIS, Appellant, v. JESSE GRODNER, Respondent.

1. *Attachment—Order of Publication—Sufficiency.*—The order of publication required by the attachment act of 1855 (R. C. 1855, p. 246, § 23) did not itself operate an attachment, but was intended to impart notice to defendant of the pending attachment. And a publication notifying defendant that his property is "about to be attached," is sufficient, within the meaning of the statute.

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*Appeal from Cedar Circuit Court.*

*T. A. Sherwood*, for appellant.

I. The court should have rendered judgment by default. The order of publication was sufficient; it was a substantial compliance with the provisions of the statute. (See Loc. Acts 1855, p. 534; Appendix of Forms to R. C. 1855, p. 1638, No. 86.) The form used in this case has thus received legislative sanction. A party who brings suit by attachment is entitled to an order of publication immediately upon filing the necessary affidavit, etc. A clerk cannot officially know that a party's property "has been attached" until due return of the writ.

*Lindenbower*, for respondent.

I. The attachment law requires that the notice by publication shall give notice to the defendant "that his property has been attached." The attachment law must be construed strictly; and an order of publication which gives notice to the defendant "that his property is about to be attached" is not a compliance with the requirements of the attachment law, and will not authorize a judgment. (*Durossett's Adm'r v. Hale*, 38 Mo. 346; *Maples v. Tunis*, 11 Hump. 108; *Wilkie v. Jones*, 1 Morris, 97; *id.* 456; *Levy v. Millman*, 7 Geo. 167; *May v. Baker*, 15 Ill. 89; *Mills v. Findley*, 14 Geo. 230; *Edwards v. Toomer*, 14 Sm. & M. 75; *Vairin v. Edmonson*, 5 Gilman, Ill., 270.) The form book attached to Revised Code of 1855 has not received legislative sanction. This has been so held by this court.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced on a promissory note, by the appellant against the respondent, in the Circuit Court of Cedar county. A bond and an affidavit for attachment were filed with the original petition, and the clerk of the said court issued an order of publication in vacation, in the form inserted in the appendix to the Revised Code of 1855. The order of publication notified the respondent that an action had been commenced against

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him by petition and attachment founded on a promissory note, and that his property "was about to be attached," and required him, at the next term of the court, on or before a given day, to appear and answer or plead. The order of publication was duly published, as provided by statute. Upon the filing of the petition, a writ of attachment was issued to the sheriff, who levied the same on the respondent's land, and certified the fact thereon at the return term. At the succeeding term, at which the notice given by order of publication was made returnable, no appearance was made by the respondent, and the appellant announced himself ready for trial, and demanded a judgment by default, which judgment the court refused to give, because no sufficient notice had been given the respondent of the commencement of the suit, and gave the appellant leave to take an *alias* order of publication or other process, which he refused to take; whereupon the court dismissed the suit, and rendered judgment against him for costs. After an unsuccessful effort to have the order of dismissal set aside and the cause reinstated on the docket, he sued out his writ of error to the District Court, where the judgment was affirmed, and the case is brought here by appeal.

This suit was commenced under the act of 1855, and must be governed by its provisions. The act expressly authorizes the clerk in vacation to make out and issue the order of publication, where the cause is alleged in the affidavit justifying such a proceeding; and, when the notice has been published the requisite time prior to the next term of the court, provides that judgment shall be rendered against the defendant, and his property sold to satisfy the same. The only object the law had in view or contemplation was to notify the party proceeded against, when he was a non-resident and could not be reached by personal service. The section uses the language that the publication shall notify the defendant that his "property has been attached," and in the present case it was stated that his "property was about to be attached."

It is not contended that there ~~was~~ any other error or defect in the published notice. Apart from the fact that the form of notice adopted by the clerk is the one in usual and customary use, there is no such variance between it and the statutory requirement as

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would injuriously affect the defendant, or ought to deprive or retard the plaintiff in his remedy. The simple order of publication of itself does not operate as an attachment—the law having pointed out the manner in which attachments shall be made—but it is intended to notify the defendant of the pending attachment, in order that he may appear in court and make his defense. When publication issues in vacation at the very commencement of the proceedings, the clerk cannot actually know and certify that the property has been attached, but he can only say that it is about to be attached; and this furnishes sufficient notice to the defendant, within the meaning of the statute. This has been the usual construction put upon the statute in practice, and is, I think, the proper one.

The judgment will be reversed and the cause remanded. The other judges concur.

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JOEL ABBOTT, Respondent, v. W. B. LINDENBOWER, Appellant.

1. *Legislature—Powers—Tax Deeds.*—The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.
2. *Tax Title—Ejectment—Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.
3. *Tax Deeds—Proceedings under, against persons not owners, would have what effect.*—A deed conveying the title under proceedings against a person who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and give it to another. (Rev. Act, art. 2, §§ 10 and 29; Adj. Sess. Acts 1863-4—Gen. Stat. 1865, p. 100, § 13, p. 104, § 39—cited and compared.)
4. *False Assessments void.*—An assessment in the name of a person who neither was nor ever had been the owner of the property, would be an utterly void assessment, and, as against the owner of property, cannot be made the foundation of a sale and conveyance of his land, even by legislative enactment.

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5. *Ejectment—Evidence—Notice.*—In such a suit, evidence was admissible to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him.
6. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax books, and collection of taxes, and return of delinquent tax lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.
7. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863-4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.

*Appeal from Polk Circuit Court.*

*H. J. Lindenbower*, for appellant.

I. The legislature is not competent to declare that a tax deed shall be conclusive evidence of the regularity and validity of the prior proceedings, as such an exercise of the power of taxation would amount to a legislative transfer, without cause and without due process of law, of the property of one citizen to another. A tax sale can only be maintained when the law has been strictly pursued. (*Rubey v. Huntsman*, 32 Mo. 501.)

II. There are essential and indispensable requisites of the power of taxation which must be observed, or the owner's title cannot be divested or transferred to another. Tax sales are against common right, and no presumption arises in favor of such sales. (*Reed v. Morton*, 9 Mo. 868; *Morton v. Reeds*, 6 Mo. 64.)

III. The provisions of the revenue law which attempt to make a tax deed conclusive evidence that each and every matter and thing required by law to be done prior to the sale, has been done, are against natural justice. (*Blackw. on Tax Titles*, 79, and authorities cited.)

IV. A "tax deed" passes no title unless the requirements of



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the law have been followed, substantially at least. (Lachman v. Clark, 14 Cal. 131; Eppinger v. Kirby, 23 Ill. 521; Dukes v. Rowley, 24 Ill. 210; Abell v. Cross, 19 Iowa, 191.)

V. A sale in gross by the collector renders the deed invalid, unless the tax deed shows that it was necessary to sell the whole tract to pay the taxes. (Lovejoy v. Lunt, 48 Maine, 339.) If susceptible of subdivision, the land must be divided by the collector. Otherwise, the sale will be void. (Crowell v. Goodwin, 3 Allen, Mass., 535.) Any departure from the requirement of the revenue law, in the assessment or collection of tax, will render a tax sale under such assessment and collection void. (Woolfolk v. Fonbene, 15 La. An. 15.) A sale inside of the court-house door, when the law requires the land to be sold in front of the court-house, will render a tax deed void. (Rubey v. Huntsman, 32 Mo. 501.)

VI. The revenue law of 1864 requires judgment to be rendered, and precept to be issued by the County Court to the collector, which is the process upon which land is to be sold. A party claiming title under tax deed must produce a valid judgment, and precept issued thereon, before he can read his deed in evidence. (Haman v. Pope, 1 Gil. 131.)

*T. A. Sherwood*, for respondent.

I. It is competent for the legislature to change the rules of evidence and to prescribe what shall be the effect of documentary evidence in all future suits. A "tax deed," made by the collector under the provisions of the revenue law (Adj. Sess. Acts 1863-4, p. 89, § 22), is conclusive evidence that all the requirements of that act had been complied with. This court has held that it was competent for the legislature to make such deed *prima facie* evidence. (City of St. Louis, to use, etc., v. Oeters, 36 Mo. 463.) And if the legislature may change or interfere with the rules of evidence, it may control them: (Steadman v. Planters' Bank, 2 Eng., Ark., 427; Allen v. Armstrong, 16 Iowa, 508.)

II. The act referred to is not obnoxious on the ground of its depriving an owner of his property without due process of law. (Pillow v. Roberts, 13 How. 472; Gwynne v. Neiswarger, 18 Ohio, 400.)

HOLMES, Judge, delivered the opinion of the court.

This was an action of ejectment upon a tax title. On the trial, the plaintiff offered in evidence the collector's deed, executed to him under the provisions of the statute of 1864 (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22), which provided that the deed should "vest in the grantee, his heirs and assigns, the title to the real estate therein described," and should be "held and received, in all courts and places where the title to the real estate thereby conveyed is involved, as *conclusive evidence* that each and every act and thing required to be done by the provisions of this act had been complied with; and the party offering such deed in evidence shall not be required to produce the judgment, precept, nor any other matter or thing, as evidence to sustain such conveyance and the title thereby acquired: *Provided, however*, that the party controverting such deed, and the title thereby conveyed, may, for the purpose of invalidating or defending the same, show either one of the following facts, only: 1st, that the land conveyed by such deed was not subject to taxation at the time of the assessment thereof, under which assessment such sale was made; 2d, that the taxes due thereon had been paid, according to law, before the sale; 3d, that such land had been duly redeemed, according to law, before the execution of such deed." The deed was read in evidence, and the plaintiff rested his case thereon.

For the purpose of invalidating this deed, the defendant offered, and the court refused to admit, evidence tending to prove: 1st, that the land had not been duly assessed for the year 1863 at the time and in the manner required by law; 2d, that the land was not assessed in the name of the real owner or any former owner, or any tenant or occupant of said land; 3d, that all the land in the county had not been assessed, but much of it omitted from the assessment of that year; 4th, that the tax book was not made out nor delivered to the collector in the manner or at the time prescribed by law; 5th, that the collector did not proceed with the collection of such tax book, nor give notice of the time and place where he would receive the taxes assessed for said year, as required by law; 6th, that the delinquent list was not made out and returned

by the collector at the time or in the manner prescribed by law ; 7th, that the collector did not give, nor was the judgment rendered upon, proper notice of his application for judgment against said land for the taxes and costs due thereon ; 8th, that no precept for the sale of said land had been issued by the clerk ; 9th, that the land was not sold at the court-house door, nor in the smallest subdivisions into which it could be divided, but was sold in gross.

All this evidence was excluded, for the reason that the tax deed was held to be conclusive evidence that everything had been done which the law required, except the three things above specified by way of exception in the act itself. An instruction was given for the plaintiff to the same effect. Instructions of a contrary tenor were refused for the defendant, and (among the rest) one to this effect: That the act aforesaid, so far as it attempts to make the tax deed conclusive evidence, as therein recited, operated to deprive the citizen of his property without due process of law, and to take private property for public use without just compensation.

There can be no doubt that the State has a sovereign power of taxation over all the property in the State which is not exempted from State taxation by the laws of the United States, and it has power to enforce the collection of taxes, assessed and levied according to law, by a sale of the property. Property sold for taxes, in the valid exercise of this power, cannot be said to be taken from the owner *without due process of law*. But the legislature, in the exercise of this power, cannot enact a law which shall have the effect simply to take the property of A. and give it to B. There are certain essential requisites of the power which are indispensable, in order to divest the title of the owner and transfer it to another. In minor matters, regarding the mode and manner of exercising the power, there is no doubt that the legislature may alter the rules of evidence, or declare what effect certain facts or documents shall have when produced in evidence ; but in the nature of things there must be a limit to this right. (There is abundant authority to the effect that the legislature may make the deed of a public officer *prima facie* evidence of title, but they cannot make it *conclusive evidence* as to matters which are vitally essential to any valid exercise whatever of the taxing power.

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In *Allen v. Armstrong*, 16 Iowa, 508, Dillon, J., lays down the rule, in terms to which we see no sound objections, thus: "We state the principle, which must be legally and logically true, in this wise: If any given step or matter in the exercise of the power to tax (as, for example, the fact of a levy by the proper authority) is so indispensable that without its performance no tax can be raised, then that step or matter, whatever it may be, cannot be dispensed with, and, with respect to that, the owner can not be excluded from showing the truth by a mere legislative declaration to that effect."

Applying this rule, we are of the opinion that evidence was admissible for the purpose of showing that the land had not been assessed for the year 1863 in the name of the real owner or of any former owner, or of any tenant or occupant of said land. It is the owner who is taxed, and not the land. He is taxed in respect to his title or ownership in the land, and taxation is to be in proportion to the value of the property. It is the owner who is to pay the tax, and it is his title or interest in the land which is to be transferred by a sale, if any title can pass.

A deed conveying the title under proceedings against a person who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and give it to another. An examination of the second article of this same act (§ 7-29) will show that the act itself recognizes the necessity that the assessment and other proceedings under the law shall be directed against the owner of the property. The land is "in all cases to be assessed to the person appearing to be the owner at the time of the assessment" (§ 10); and when "the name of the owner or claimant cannot be ascertained, such lands shall be taxed by the numbers, and in the name of the original owner," and shall "be sold and conveyed by their numbers, and in the name of the original owner, without reference to the present owners or claimants." (§ 29.) It is unnecessary for us to say further here, what might be the effect of this last clause in any case; but we may go so far as to declare now that an assessment in the name of a person who

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neither was nor ever had been the owner of the property would be an utterly void assessment. (*Whitney v. Thomas*, 23 N. Y. 281.)

The assessors have no jurisdiction to assess property otherwise than as the statute prescribes; and a void assessment (which is equivalent to no assessment at all) against the owner cannot be made the foundation of a sale and conveyance of his land, even by legislative enactment. A valid assessment is an essential prerequisite to the lawful exercise of the power of taxation. It is a necessary condition of an effectual transfer of the title.

We are of the opinion, further, that evidence was admissible to show that the judgment against this land had been rendered without notice to the owner thereof. The statute requires such notice. Without notice to the owner, or unless he were brought before the court in some manner, there could be no lawful jurisdiction over him, and a judgment so rendered would not be *per legem terræ*.

With regard to the other matters of evidence above enumerated, we are inclined to think they were not essential pre-requisites to the lawful taxing power in the State, and that the act cannot be declared unconstitutional, for the reason that it makes the deed conclusive evidence that all those things had been rightly done. They were matters of form which might be taken against him by default.

It is a rule that an act of the legislature will not be declared unconstitutional and void unless the matter be clear and certain beyond reasonable doubt. The clause which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument, when it has any effect at all. Such provisions are to be construed strictly. A statute which made the deed "conclusive evidence that the sale was regular, according to the provisions of this act," and declared that it should vest an absolute fee simple, has been confined in its operation to the sale only. (*Scott v. Y. M. Society*, 1 Doug., Mich., 121; *Doughty v. Hope*, 3 Denio, 595; *Beekman v. Bingham*, 1 Seld. 366; *Blackw. Tax Tit.* 83.) But this act (§ 22) makes the deed conclusive evidence "that each and every act and thing required to be done by the provisions of this act had been com-



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plied with." It precludes any evidence whatever for the purpose of invalidating the deed, except in respect to the three matters mentioned and excepted. These three things are not the only essential conditions of a valid and lawful exercise of the power of taxation.

We think it may be safely said that a valid assessment of the property to the true owner, and notice of the judgment to be rendered against him, are indispensable, in order that the transfer of his title to another may be effectual *per legem terræ*. In these respects, and so far, we hold the act to be unconstitutional. (Curry v. Hinman, 11 Ill. 428; Blackw. on Tax Tit. 81.)

Judgment reversed and the cause remanded. The other judges concur.

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NEWELL CATES, ADM'R OF WILLIAM SNADON, Respondent, v.  
THOMAS NICKELL, Appellant.

1. *Promissory Note — Verdict — Judgment.*—In an action upon a promissory note, where the answer simply denied the execution of the note, and the cause was submitted to the jury, it was their duty, under the provisions of Gen. Stat. 1865, chap. 169, §§ 21 and 26, not simply to find a general verdict for plaintiff, but also to assess the amount due upon the judgment; and the court is not authorized to invade the province of the jury, and, in case of a general verdict by them, to proceed to ascertain the amount due upon the note and render judgment thereon.

*Appeal from Dade Circuit Court.*

T. A. Sherwood, for appellant.

I. The verdict did not support the judgment, and was not in conformity to the provisions of the statute in such cases. (Gen. Stat. 1865, pp. 674-5, §§ 21, 26; Dysart's Adm'r v. Austin *et al.*, 36 Mo. 47, and cases cited; Branstetter v. Rives *et al.*, 34 Mo. 318, and cases there cited.)

Lindenbower, and Bray, for respondent.

I. If a judgment upon a promissory note be irregular for lack of assessment of plaintiff's damage by the jury, yet it is such an

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irregularity or omission as does not prejudice the defendant, and will not be sufficient to reverse the case. (Gen. Stat. 1865, p. 671, § 19; 15 Mo. 115.)

FAGG, Judge, delivered the opinion of the court

This action was instituted, in the Dade Circuit Court, upon a promissory note. The answer simply denied the execution of the note, and, the cause being submitted to a jury, the following verdict was rendered: "We, the jury, find the issue in favor of the plaintiff." The jury being thereupon discharged, the court proceeded to ascertain the amount then due upon the note, including principal and interest, and rendered judgment for the same. Upon an appeal to the District Court, this judgment was affirmed, and the defendant, Nickell, has again taken an appeal to this court.

The sufficiency of the verdict to authorize the judgment of the Circuit Court is the only question presented by the record. Gen. Stat. 1865, chap. 169, §§ 21 and 26, contain the provisions by which this question must be determined. The first directs that "in every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict." The next provides as follows: "When a verdict shall be found for the plaintiff, in an action for the recovery of money only, the jury shall also assess the amount of the recovery," etc. It is plain that the jury must make a finding upon all the issues presented by the pleadings. All the facts necessary to support the judgment must be found, and the court is not authorized to invade the province of the jury in this respect.

The action here is for the recovery of money only, and the general verdict finding the issue for the plaintiff was only a part of the duty absolutely imposed by the statute upon the jury.

The assessment of the amount of the recovery to which the plaintiff was entitled could only be made upon a finding of the facts shown by the evidence in the cause, and is not necessarily the amount alleged to be due in the petition. It is insisted, on the part of the respondent, that this irregularity is of such a character as not to affect prejudicially the rights of the defendant below.

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There is no warrant for any such conclusion.

The amount of the debt due at the time was not passed upon by the jurors, and this could only be done by them as the triers of the fact. The note upon which the suit was brought is not to be taken as conclusive evidence of the amount due, and the court could not assume that fact from the general verdict rendered. The recognition of such a practice as this, we think, would open the door to innumerable errors and irregularities. These can be easily avoided by following, in all cases, the plain and obvious meaning of the statute.

The judgment of the District Court must be reversed and the cause remanded to the Dade Circuit Court. The other judges concur.

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THE LEAVENWORTH AND DES MOINES RAILROAD COMPANY, Relator, v. THE COUNTY COURT OF PLATTE COUNTY, Respondent.

1. *Railroads—County Court—Subscription—Election—Construction of Statute.*—The power given by section six of the act to incorporate the Platte City and Fort Des Moines Railroad Company (Adj. Sess. Acts 1859-60, p. 443), to the County Court of Platte county, to subscribe capital stock to said company, is, by section eight of the same act, made subject to the general railroad law. (R. C. 1855, p. 427, § 30.) And the true meaning and effect of this law is, that an election to ascertain the sense of the tax-payers as to such subscription is a necessary condition of the power to subscribe. A subscription made without such election was without authority of law, and void.

*Norton, Merryman, Doniphan, and Clough*, for appellant.

I. The County Court of Platte county, by virtue of the sixth section of "An act to incorporate the Platte City and Fort Des Moines Railroad Company," approved January 4, 1860 (Adj. Sess. Acts 1859-60, p. 443), was fully invested with the power to subscribe to the capital stock of said company, and issue the bonds of the county to raise funds to pay the stock thus subscribed. This section confers upon the County Court of Platte county a particular authority, unrestrained by section thirty of an act entitled "An act to authorize the formation of railroad

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associations, and to regulate the same" (R. C. 1855, p. 427), to subscribe to the capital stock of this particular company, without requiring an election to be held to ascertain the sense of the tax-payers. (Mo. & Miss. R.R. Co. v. The County Court of Macon county, 41 Mo. 453; Dunklin County v. The District Court of Dunklin County, 23 Mo. 449 *et seq.*)

II. In the act of January 14, 1860 (Adj. Sess. Acts 1859-1860, p. 88), there is no repeal of that of January 4, 1860, nor is there any absolute inconsistency between the two acts. The act of January 4, 1860, was a special law delegating to the County Court of Platte county a power to subscribe stock in this particular company; the act of January 14, 1860, was a general law regulating the power of county courts generally, under a general statute, to subscribe stock to railroads generally. The special permission to the County Court of Platte county, in section six of the act of January 4, 1860, to subscribe stock to the Platte City and Fort Des Moines Railroad Company, without submitting the question to a vote of the tax-payers, may well subsist with the general prohibition in the act of January 14, 1860, requiring county courts, before subscribing stock to railroad corporations, for information, to take the sense of the tax-payers touching such subscription. Repeals by implication are never favored, and the repugnancy between the provisions of two statutes must be clear, and so contrary to each other that they cannot be reconciled, in order to make the latter operate as a repeal of the former. (Sedg. on Stat. & Cons. Law, 250; 2 Ohio St. 610; 5 Ind. 415; 6 Ind. 356; 10 Ohio, 177.)

III. Section eight of the act of 1860 (Adj. Sess. Acts 1859-60, p. 443) relates in its provisions to section seven, and not to section six.

IV. If section thirty of the general law applies, plaintiff insists that the provision requiring a note for information is merely directory, and not mandatory. (23 Mo. 449.)

*Jewitt and Campbell*, for respondent.

I. On the 6th of April, 1860, the County Court of Platte county made the order purporting to subscribe \$100,000 to the

Platte City and Fort Des Moines Railroad. Neither before that time nor since, nor at any time, has any vote of the tax-paying citizens of Platte county been taken as to such subscription. It was the subscription of the County Court alone and unsupported. That court had no power to make such subscription without first submitting the matter to a vote of the tax-payers. The charter of the company, entitled "An act to incorporate the Platte City and Fort Des Moines Railroad Company," approved on the 4th day of January, 1860 (Adj. Sess. Acts, 1859-60, p. 443), gives no such power. For section six of said charter is to be taken in connection with section eight. Section eight incorporated into said charter section thirty of "An act to authorize the formation of railroad associations, and to regulate the same," approved December 13, 1855 (R. C. 1855, p. 427). It is provided in said section thirty that "it shall be lawful for the County Court of any county," etc., "to subscribe to the capital stock of any railroad company duly organized under this or any other act of this State; and the County Court," etc., "subscribing, or proposing to subscribe, to such capital stock, may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county," etc., "as to such subscription," etc. The word "may," here used, is imperative. It is equivalent to "must" or "shall," for the tax-payers have a right to be consulted before their property is confiscated. The public have to pay any such subscription, and therefore the public interest is concerned, and "may" is to be construed as "must" or "shall." (Newburg Turnpike Co. v. Miller, 5 Johns. Ch. 113, and authorities; Malcolm v. Rogers, 5 Cow. 188; Alderman Backhill's case, 1 Vern. 152; Rex v. Barlow, 2 Salk. 609; Stamper v. Miller, 3 Atk. 211; Attorney General v. Lock, 3 Atk. 166; Rex v. Inhabitants of Derby, Skin. 370; 1 Peters, 64; Blake v. Portsmouth and Concord Railroad, 39 N. H. 435.) Even if the word "may" should be interpreted otherwise than as above insisted, this would still follow; because, on the 14th day of January, 1860, just ten days after the approval of the charter of the railroad now demanding this mandamus, an act was approved entitled "An act to amend an act entitled 'An act to authorize the formation of railroad



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associations, and to regulate the same,' approved December 13, 1855." By this act the words "may, for information," are changed into "shall, for information." Now, in the construction of statutes, all acts in *pari materia* are taken as if they were one act—one law. (Chambers v. City of St. Louis, 28 Mo. 575; Wakefield v. Phelps, 37 N. H. 295; Attorney General v. Brown, 1 Wis. 513; 1 Kelly, 32; Mitchell v. Duncan, 7 Florida, 13.)

II. Statutes in derogation of common right, and charters of incorporation, are to be strictly construed. (3 Kelley, 31; 35 Miss. 189.) If, in a charter of incorporation to a railroad company, a power is given to a portion of the State government, such as the County Court is, that power is to be exercised in conformity to any limitations imposed by law. The charter of the Platte City and Fort Des Moines Railroad may confer the power on the County Court to subscribe stock to said railroad, but it neither impliedly nor expressly repeals section thirty of the act of December 13, 1855, above referred to. There is no express repealing clause, and the charter and the act of December 13, 1855, can well stand together. (Ludlow v. Johnson, 3 Ohio, 553; Dodge v. Gridley, 10 Ohio, 173.)

HOLMES, Judge, delivered the opinion of the court.

This is an application for a mandamus upon the County Court of Platte county, to require the court to issue the bonds of the county in pursuance of an alleged subscription to the stock of the Leavenworth and Des Moines Railroad Company, under "An act to incorporate the Platte City and Des Moines Railroad Company," approved January 4, 1860, and certain other amendatory acts. (Adj. Sess. Acts 1859-60, p. 443, § 6; *id.* p. 88, §§ 1, 2; R. C. 1855, p. 427, §§ 30-35.)

The case depends upon the construction which is to be given to the first-named act, by which the company was chartered. The sixth section gives the County Court a general power to subscribe stock. By the eighth section this power is expressly limited, and made subject to the provisions of the general railroad law (R. C. 1855, p. 427, § 30), which provides that the County Court "may, for information, cause an election to be held to ascertain the sense

of the tax-payers" as to such subscription. No such election was directed. This was a necessary condition of the power to subscribe. That all the sections of the act are to be construed together is a well-settled rule of construction. The word "may," in this clause, must be interpreted to mean "shall." It is a power given to public officers, and concerns the public interest and the rights of third persons, who have a claim *de jure*, that the power shall be exercised in this manner for the sake of justice and the public good. (Newburg Turnpike Co. v. Miller, 5 Johns. Ch. 113; Blake v. Portsmouth and Concord R.R., 39 N. H. 435; Malcolm v. Rogers, 5 Cow. 193; 2 Salk. 609.) This construction is confirmed by the act passed at the same session amendatory of this thirteenth section, and making the act read "shall" instead of "may." This amendment may be taken as declaratory of the true meaning of the former act. It follows that the subscription, as made, was without the authority of law, and void. If the subscription had been lawfully made, it might have become the imperative duty of the County Court to issue these bonds, and the performance of that duty might have been enforced by the writ of mandamus. In the positive requirement that the sense of the tax-payers should first be taken, it is necessarily to be implied that the power was not to be exercised without their consent and authority. In this view of the matter, it is apparent that the case of The Missouri and Mississippi Railroad Company v. The County Court of Macon county, decided by this court at the October term, 1867, and other cases relied upon by the petitioner, relating to the question of a repeal of a special act by a subsequent general law, have no application to this case.

This conclusion being decisive of this application, it becomes unnecessary to consider further the other points which have been presented in the argument.

Peremptory mandamus refused. The other judges concur.

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State of Missouri ex rel. Foster v. Rodman.

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STATE OF MISSOURI *ex rel.* EMORY S. FOSTER, Relator, *v.*  
FRANCIS RODMAN, Secretary of State, Respondent.

1. *Public Printer—Appendix—Price allowed.*—Under the twenty-first section of the act concerning the public printer (Gen. Stat. 1865, p. 148), the appendix to the journal of either house of the General Assembly constitutes a part of the journal; and although the greater part of the reports and public documents, incorporated in the appendix by virtue of that section, had already been printed in the journal, under the order of the two houses, or in pursuance of a law of the State requiring it to be done, yet the public printer would be entitled to charge separately for it, at the prices regulated by law. (*State ex rel. Dyer v. Thompson*, 41 Mo. 240, affirmed.)

*Ryland & Blodgett*, for relator.

*Jewitt*, for respondent.

FAGG, Judge, delivered the opinion of the court.

The application of the relator shows that, as the public printer of the State, duly elected and qualified, he did, in pursuance of the directions of a concurrent resolution of the twenty-fourth General Assembly, and in the manner required by law, print one thousand copies of the journals of each house composing the said Assembly; that the copies so printed, bound in the manner required, were by him delivered to the respondent, who accepted the same on behalf of the State, for distribution; that his accounts for said work were duly made out and presented to the respondent, to be certified to the State Auditor, as required by law, which was refused.

The petition is accompanied by a statement of the items contained in the accounts, and a peremptory mandamus prayed for, requiring the respondent to certify the same to the auditor for allowance. The return of the respondent admits all the averments in the application relating to the execution of the work. The whole question of the correctness of the accounts is, by the return, made to depend upon the construction of the law prescribing the duties of the public printer in relation to the printing of the journals and fixing the amount of his compensation therefor. It is stated that "the appendixes to the journals of the House and

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State of Missouri ex rel. Foster v. Rodman.

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Senate are made up of documents ordered to be printed by one or both houses, and of the reports of the different public officers made to the General Assembly."

The appendixes to the House and Senate journals (for the printing of which about three-fourths of the bill set up in the petition was and is made up) are composed of the same documents, except about one hundred and twenty-five pages. Upon an examination of the accounts, it will be seen that they have been made out strictly according to the rate of charges fixed by the eighteenth and twenty-first sections of chapter twenty of the General Statutes of 1865. These two sections regulate the prices of the printed matter in the journals, and also for the folding, stitching, and binding. In giving a construction to the twenty-first section, above referred to, this court held, at its last July term, in the case of *The State ex rel. Dyer v. The State Auditor*, that the appendix necessarily constituted a part of the journal, and that the secretary of the Senate was entitled to the same compensation for copies of the matter contained in the one as the other. By section twenty-eight of the same chapter, it is made the duty of the secretary of the Senate and chief clerk of the House of Representatives to furnish the public printer, every day during the session of the General Assembly, a copy of the journal of his house for the day preceding, till the whole shall be copied and delivered. The order of the two houses, therefore, for the printing of the specified copies of the journal of each, necessarily covered the matter contained in the appendix as well as the daily proceedings. The sixteenth section of the same chapter directs that "within ninety-five days after the adjournment of each session of the General Assembly, the public printer shall print and deliver to the Secretary of State such number of the copies of the journals of each house of the General Assembly as they may direct," etc. It will be seen by the return that the chief ground of objection to the accounts consists in the fact that the principal matter charged for in the appendixes had already been printed under the order of the two houses of the General Assembly, or in pursuance of a law of the State requiring it to be done. There is nothing in the facts presented that can authorize us to presume that the public documents were actually printed

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State of Missouri ex rel. Foster v. Rodman.

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at the same time with the appendixes, or that they were set up in such form that they could be included within it. The work may be the same, however, in every particular, yet it was executed upon separate orders, and the printer would be entitled to charge for it as such. Upon the facts here stated there seems to be no other conclusion but that they were executed at different times and upon different orders, and therefore constituted separate and distinct jobs, and should be charged and paid for accordingly. If the General Assembly at any time orders the printing of public documents disconnected from an order for the printing of its journals, and the work is executed as directed, it stands upon the ground of a separate contract for so much work, to be paid for at the prices regulated by law.

The printer would have no right to assume that any given number of the journals containing such documents, by way of an appendix, would be ordered by either house, and we are at a loss, as the law now stands, to see how his account could be made out in any other shape than the one in which it is presented. We are not at liberty to assume that the work here charged has already been paid for, and that by allowing the present account the public printer will receive double compensation for the same services. But if such be the fact, the fault, we think, is in the law itself, and can only be cured by the legislative power.

A peremptory mandamus is therefore ordered, requiring the Secretary of State to certify the accounts to the State Auditor as correct. The other judges concur.

[END OF JANUARY TERM.]



CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
FEBRUARY TERM, 1868, AT ST. JOSEPH.

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STATE, TO USE OF BRADSHAW, Appellant, v. WM. M. SHERWOOD  
*et al.*, Respondents.

1. *County Collector — Refusal to issue Certificate — Action for Damages.*— A party cannot maintain an action for damages against the clerk of a county court for issuing a certificate of election to the office of State and county collector to another, and thereby depriving plaintiff of the emoluments of that office. The action for damages is predicated upon the idea that he is deprived of a legal and valid right. But plaintiff's proceeding is a virtual admission that the person to whom the certificate is issued is legally in possession of the office, and he cannot recover damages for being deprived of what does not belong to him. He cannot be permitted to disclaim his right to the office, and then have damages for being deprived of it.
2. *What remedies will lie.*— If the clerk refused to perform his functions in casting up the vote, or in issuing the certificate, an ample and complete remedy would be furnished by resorting to a mandamus; or, after the certificate was issued to the other party, and he had qualified, the title to the office could be tested and decided by a writ in the nature of a *quo warranto*.
3. *Statutory Rights — Relief — Jurisdiction.*— The principle that where a new right is conferred by statute, and a specific relief given for a violation of that right, all other jurisdictions are ousted, is not applicable to the present case.
4. *Pleadings — Jurisdiction — Question of, how raised.*— The objection raised by demurrer, that the court had no jurisdiction, would have been more properly

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State, to use of Bradshaw, v. Sherwood et al.

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raised by answer, inasmuch as the want of jurisdiction did not appear on the face of the petition. If the answer, when filed, denied the right of the plaintiff to the office, that would have amounted to an ouster of jurisdiction, because it would have made a contest indispensable. (Gen. Stat. 1865, p. 66, § 50.)

5. *County Collector—Right to Certificate—In what Court determined.*—The County Court was the tribunal in which the contest should have taken place, and the Circuit Court had no jurisdiction when the question concerning the right to the office was raised.

*Appeal from Buchanan Circuit Court.*

*Vories, Hall & Oliver, and Parker, Strong & Chandler,*  
for appellant.

I. This action is not brought to try the right of the respective parties to the office, but to recover damages for a breach of the official bond of an officer. The only question which could arise in such case, upon a demurrer, is, Does the petition show a breach of the conditions of the bond? If it does, then all other questions which may arise are questions concerning the amount of damages. It is admitted by this demurrer that the election was properly held; that the poll-books were properly certified to Sherwood; that Bradshaw had a majority of the qualified votes cast and certified; that it became the duty of Sherwood, under the law, to cast up the votes in eight days, and give the certificate of election to the one having the highest number of votes; that he, with a view to defraud and injure Bradshaw, failed and refused to either cast up the votes or give the certificate; but that he falsely and fraudulently issued a certificate of election to Pinger. All this being admitted, it is difficult to see how it could be shown that Sherwood had faithfully discharged the duties imposed upon him by law. The question as to what facts plaintiff would be able to show in evidence as a ground of actual pecuniary damages, cannot arise upon this demurrer. If a breach of duty is shown, he has a cause of action for something. (Ashby v. White, 1 Sm. Lead Cas. 290; State for Bell v. Harrison, 38 Mo. 540; Jenkins v. Waldron, 11 Johns. Ch. R. 120; People v. Rives, 27 Ill. 246, 247; United States v. Kendall, 12 Pet. 614, 615.)

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State, to use of Bradshaw, v. Sherwood et al.

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*Jones, Hunter, Hill & Hereford, and Bassett & Pike, for respondents.*

I. The office of collector of the State and county revenue for Buchanan county is credited by a statute specially applicable to Buchanan county. (Adj. Sess. Acts of 1863-4.) The statutes of Missouri also provide an ample and adequate remedy for plaintiff, provided the clerk of the County Court awards the certificate of election to a person not having a majority of the legal votes. It also provides for the punishment of the county clerk by indictment, or he may be sued for two hundred dollars damages in a civil action for a violation of duty. (Gen. Stat. 1865, p. 65, § 39; p. 66, §§ 50, 52-59.) And where a new right is conferred by statute, and specific relief given for a violation of that right, all other jurisdictions are ousted. The party is denied all common law remedies, and strictly confined to the remedy given by statute. (Sedg. on Cons. Stat. 94; 22 U. S. Dig. 13, § 19; 21 *id.* 11, §§ 16, 19; 19 *id.* 12, §§ 2, 4, 5, 6; 18 *id.* 12, § 9; 17 *id.* 10, § 10; 3 Comst. 9; 1 Met. 130; 6 Mass. 39; 36 Mo. 543, 547.)

II. Plaintiff cannot recover, by reason of claiming a right to the office, until such right has been established by a direct contest, either by *quo warranto* or mandamus. Where, as in this case, the office is already filled by an officer *de facto*, the right to the office can only be established by *quo warranto*, making Pinger, the officer *de facto*, a party thereto. (21 Pick. 148; 6 Cow. 23; 17 Conn. 585; 5 Hill, 616; 10 Mo. 632; 35 *id.* 146; 36 *id.* 71; 38 *id.* 540; 9 Mass. 234; 37 Me. 423.)

III. The certificate delivered by Sherwood to Pinger is conclusive in every form in which a question of the right to the office can arise, except where there is a direct proceeding, in the nature of *quo warranto*, against the officer *de facto*. (20 Wend. 12; 17 *id.* 81; 24 Barb. 203.)

IV. Where an officer fails to do an act, and the failure results in a common injury, he can only be proceeded against by indictment. Where, however, a private person sues for neglect of

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duty, he must aver in his declaration some special damage in regard to a violation of a right vested in him. This declaration shows no such violation. (18 How. 396.)

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff, in the Buchanan Circuit Court, against the defendants, Sherwood and his securities, on an official bond, alleging a breach of the condition thereof, and claiming special damages.

The petition states that, at the November election, 1866, the plaintiff Bradshaw and John Pinger were candidates for the office of collector of the State and county revenue for Buchanan county, Missouri; that at said election two thousand seven hundred and ninety-seven votes were cast, by the qualified voters of the county, for the said office of collector; that of these votes one thousand three hundred and ninety-nine were cast for Bradshaw, and one thousand three hundred and ninety-eight for Pinger, and that Bradshaw, having received a majority of the votes, was therefore duly elected.

The petition further states that Sherwood, being county clerk of the county of Buchanan, disregarding his duties in the premises, failed, neglected, and refused to cast up the votes given to each candidate for said office of collector, as certified and returned to him, within eight days from said election, or at any other time; and that he still fails, refuses, and neglects to give to the said Bradshaw a certificate of his election, notwithstanding Bradshaw has received a majority of all the qualified votes at said election for the said office of collector; that Sherwood, being clerk as aforesaid, with intent to injure and defraud Bradshaw, and to unlawfully deprive him of the emoluments of said office, did, on the — day of November, 1866, unlawfully, willfully, falsely, and fraudulently, issue the certificate of election to the office of collector, to the said John Pinger, and then and thereby deprived Bradshaw of the office and emoluments to which he had been legally elected, to his damage in the sum of twenty thousand dollars, for which he brings the statutory suit on the clerk's official bond.

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State, to use of Bradshaw, v. Sherwood et al.

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To this petition the defendants filed a demurrer, and stated, for grounds of objection, that the petition did not allege facts sufficient to constitute a cause of action, and that the Circuit Court had no jurisdiction of the cause. The demurrer was sustained in the Circuit Court, and on error in the Fifth District Court the judgment below was affirmed.

The case has been argued here with ability, and counsel have indulged in elaborating many points which we consider it unnecessary to examine, as the essential merits involved do not include them. We are not willing to concede the proposition, so confidently insisted upon by the defendants' counsel, that, because the office of collector is wholly of statutory creation, a party legally entitled to it, and who is deprived of it through the gross wrong or tortious fraudulent acts of a clerk whose duty it is, under certain circumstances, to issue the certificate, can have no remedy except what is specifically pointed out by the statutes. We can readily conceive that cases may occur where a party can present himself in such a shape as to be entitled to recover damages from the officer on his official bond in consequence of injuries suffered by a malicious neglect or refusal to perform his appropriate legal duties. The principle that where a new right is conferred by statute, and specific relief given for a violation of that right, all other jurisdictions are ousted, is not applicable to the present case.

The controlling question is, Does the plaintiff make out such a case by the allegations in his petition as to enable him to maintain an action for damages? The action for damages must be predicated upon the idea that he has been deprived of a legal or valid right. It is intended to be compensatory for the official emoluments which he has lost, and may also include all the necessary expenses and charges which are the immediate consequence of the deprivation, and which are rendered indispensable in the assertion of his just and lawful claim. But if another person is rightfully in possession of the office, the plaintiff's right of action is defeated, for two persons cannot have a legal title at the same time to the office. The plaintiff does not claim the office. He virtually admits that Pinger is in possession, and the logical deduction is that he is legally in possession. If Pinger is legally holding the



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office as collector, then the plaintiff cannot recover damages for being deprived of what does not belong to him. If, however, the plaintiff is the rightful and lawful occupant thereof, he should assert his claim, and pursue his remedy in the mode established by law. The plaintiff cannot be permitted to disclaim his right to the office, and then have damages for being deprived of it, or, to use the language employed by Lord Mansfield on another occasion, he "cannot blow hot and cold at the same time." If the clerk refused to perform his functions in casting up the vote, or in issuing the certificate, an ample and complete remedy would have been furnished by resorting to a mandamus; or, after the certificate was issued and Pinger had qualified, the title to the office could have been tested and decided by a writ in the nature of a *quo warranto*.

The second reason assigned in the demurrer, that the court has no jurisdiction of the cause, would have been more properly taken by answer. It did not appear that the court had no jurisdiction on the face of the petition. That fact was to be raised by the issue presented in the answer. If the answer, when filed, denied the right of the plaintiff to the office, that would at once have amounted to an ouster of jurisdiction, because it would have made a contest indispensable.

The statute provides that if any election of any constable, assessor, justice of the peace, county surveyor, or other county officer, be contested, such contest shall be heard and determined by the County Court of the county in which the election is held, unless the decisions of such contest be otherwise provided for by law. (Gen. Stat. 1865, ch. 2, p. 66, § 50.) The office of collector of Buchanan county is a county office, created by special enactment, and no provision is elsewhere made in the statutes in regard to its being contested. The County Court was the tribunal in which the contest should have taken place, and the Circuit Court had no jurisdiction whenever that question was raised. But this subject is unimportant, and need not be discussed, in the view that we have taken of the facts set out in the petition.

The judgment must be affirmed. The other judges concur.

## PATRICK SMITH, Appellant, v. WILLIAM BEST, Respondent.

1. *Trial—Motion to correct Judgment.*—If a mere error or mistake in entering up a judgment is sought to be corrected, it can only be done by motion, filed within the proper time, and within the term at which the judgment is recorded. Such motion may, however, be continued over for cause, and determined at a subsequent term.
2. *Trial—Petition—Notes, treated as evidences of debt—What time given defendant to answer.*—Where the cause of action set out in the petition was for work and labor done, with a separate statement of the amount of each account, coupled in every case with reference to papers attached to the petition in the following form: "as will more fully appear by the evidence of indebtedness herewith filed"—it was immaterial to inquire whether these "evidences of indebtedness" were, in point of fact, notes for the direct payment of money or not. Plaintiff having elected to declare upon the original cause of action in this manner, defendant was entitled to six days within which to plead; and the court will, on motion at a subsequent term, the irregularity being shown to its satisfaction, set aside a judgment given for plaintiff within that time, or do whatsoever the justice of the case may require.

*Appeal from Buchanan Court of Common Pleas.*

*Parker, Strong & Chandler*, for appellant.

I. The instruments sued on were notes. (McGowan v. West, 7 Mo. 564; Brady *et al.* v. Chandler, 31 Mo. 28.)

II. The judgment of October 17, 1866, on the notes, was regular, and was taken at the proper time; and, no fraud or legal surprise being shown, the court erred in setting it aside. (7 Mo. 22; 19 Mo. 184.)

III. The first motion to set the judgment aside being withdrawn at the next term after the judgment was rendered, and another motion being filed afterward, the court had no right to set aside the judgment. The power of the court to interfere with a regular judgment closes with the term. (Harbor v. Pacific R.R., 32 Mo. 423; Ashley v. Glasgow, 7 Mo. 320; Hill v. City of St. Louis, 20 Mo. 584; Brewer v. Dinwiddie, 25 Mo. 351. *Vide*, also, 34 Mo. 476, 501; 6 Mo. 234.)

IV. Plaintiff properly refused to go to trial upon issues made by defendant's answer, and properly insisted on his rights under the judgment of October 17, 1866. (34 Mo. 326; 32 Mo. 423.)

V. If there was any defect in pleading in the case, the judgment cured it. (Gen. Stat. 1865, p. 671, § 19.)

*Vories & Vories*, and *Woodson & Jones*, for respondent.

I. It makes no difference, in this case, whether the instruments filed with the petition were promissory notes or not; for if they were notes (which is denied), yet the petition counts on the original cause of action, which is not merged. (*Hanna v. Pegg*, 1 Blkf., Ind., 181; *Brown v. Gauss*, 10 Mo. 265-6.) There is no promise to pay charged in this petition, and therefore a judgment rendered in the case, as upon a promissory note, would be bad after verdict. (*McNeely v. Collins*, 7 Mo. 69; 6 Mo. 276.)

II. The suit being brought for work and labor, and not on a note, the defendant had six days of court in which to appear and answer, and no judgment by default could be properly taken before that time had expired, and no final judgment until the next term of the court.

III. The defendant had a right to file his motion, and to have the judgment irregularly rendered set aside, either at the same term or the next term of the court where the irregularity appeared on the record. (*Stacker v. Cooper* Circuit Court, 25 Mo. 401; *Doan v. Hally*, 27 Mo. 256.)

IV. It is discretionary with a court to set aside a judgment by default, and in this case it cannot be seen but that the discretion was soundly and properly exercised.

FAGG, Judge, delivered the opinion of the court.

This cause is brought here by appeal from the Fifth District Court. The suit was instituted in the Buchanan Court of Common Pleas, in August, 1866, and made returnable to the September term of that court.

On the third day of the term, the respondent having failed to enter his appearance and plead to the action, a final judgment was entered against him. A motion to set aside this judgment and permit him to answer was filed within the proper time, but con-

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Smith v. Best.

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tinued over until the next term. The record shows that during that term, and on the 8th day of January, 1867, this motion was withdrawn; and on the 12th day of the same month another motion was filed, asking the court, for the irregularities therein set forth, to set aside the judgment, and permit respondent to answer the plaintiff's petition. This motion was sustained, and the answer duly filed. At a subsequent term of the court, the case being called for trial, the appellant (plaintiff below) refused to proceed further, and the cause was dismissed for want of prosecution.

Upon a careful examination of the former decision of this court upon the question of practice presented by this record, it is clear that, if a mere error or mistake in entering up a judgment is sought to be corrected, it can only be done by motion, filed within the proper time, and within the term at which the judgment is recorded. Such motion may, however, be continued over for cause, and determined at a subsequent term. In this case there was a continuance, and it would have been consistent with the rules of practice heretofore recognized by this court for the Circuit Court to have determined the same at the next term. This motion, however, seems to have been abandoned, and need not be further noticed. The one subsequently filed, on the 12th day of January, presents really the only question to be examined in this case. It is conceded that it was separate from and wholly independent of the former motion, and the reasons upon which it is based, if true, were altogether sufficient to justify the action of the court in sustaining it. It alleges that the suit instituted by the appellant was not founded upon a bond, bill, or note, for the direct payment of money; that in point of fact it was simply an action upon account for work and labor done, and therefore, according to the law regulating practice in civil cases, the respondent was not compelled to answer or otherwise plead to the action before the sixth day of the term. It appears from the petition that the appellant's claim amounted altogether to the sum of three hundred and fourteen dollars and three cents, and consisted of small amounts alleged to be due, and owing by a certain firm (of which the respondent was a member), to a large number of persons, for work and labor performed in the construction of a railroad;

that there was in each case written evidence of this indebtedness executed by the firm, and transferred by assignment to the appellant, and that he was the legal and equitable owner and holder of the same. These papers were all attached to and filed with the petition. It is not material to inquire whether these evidences of indebtedness, as they are called by the pleader, are, in point of fact, notes for the direct payment of money or not. They are not so treated by the petition, and are not declared upon as promises to pay, but referred to simply as evidence of the amounts due to the several persons by whom they were assigned on account of the work and labor alleged to have been performed. The real cause of action, as set out in the petition, is the work and labor done, with a separate statement of the amount of each account, coupled in every case with a reference to these papers in the following form: "as will more fully appear by the evidence of indebtedness herewith filed," etc. Having elected to declare upon the original cause of action in this manner, the appellant cannot complain of the enforcement of a rule of practice fixed by the law itself, and which the courts cannot disregard if they would. It follows, from this view of the petition, that the respondent (defendant below) had six days within which to plead to the action, and any judgment rendered before the expiration of that time was irregular, and cannot be sustained. In the case of *Brewer v. Dinwiddie*, 25 Mo. 351, it was held that, when there is any irregularity in the proceedings, the court will, on motion at a subsequent term, the irregularity being shown to its satisfaction, set the judgment aside, or do whatever the justice of the case may require. The cases of *Doane v. Holly*, 27 Mo. 256; *Harbor v. Pacific R.R. Co.*, 32 Mo. 423; *Lawther v. Agee*, 34 Mo. 372, and all the cases therein cited, concur in sustaining the position that the motion under consideration was the proper remedy for the irregularity complained of, and that it was filed in proper time.

The judgment must therefore be affirmed. The other judges concur.



ALLEN MCNEW, Appellant, v. ELIZABETH BOOTH, Respondent.

1. *Equity—Purchaser—Fraud—Relief.*—It is a well-settled principle of equity law that where one becomes a purchaser, under such circumstances as would make it a fraud to permit him to hold on to his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtains it at a sacrifice, the court will relieve against such fraud; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby.
2. *Equity—Payment—Reasonable Time.*—Where, in case of property sold under a deed of trust, the debtor party is promised a reconveyance thereof upon payment of the money owing under the deed within a reasonable time, special circumstances, the situation of the parties, and the character of the property, must be taken into account in affixing the standard. Where a person became possessed of property in such a way that the law would have held him a trustee, the lapse of time would make no difference.

*Appeal from Buchanan Circuit Court.*

*Woodson & Jones*, for appellant.

I. It is clearly shown that the property was sold by the trustee with the distinct understanding that it might be redeemed; and, such being the agreement, the title was held in trust by defendant. (Brown on Fr., § 34, and cases referred to; 1 Watts, 214; 12 Mo. 30.)

II. A "reasonable time," as mentioned in this agreement, and its determination, might depend upon the circumstances of the parties; but a trust created by parol cannot be revoked, altered, or extinguished. (Hill on Trust. 60.)

III. The property being held in trust by the defendant, such trust could not be terminated without some act on part of defendant. (See same authority.)

IV. The refusal of defendant to permit plaintiff to redeem, under the circumstances, is a fraud upon plaintiff, and the deed should be set aside. (Hill on Trust. 144-7, 151; 12 Mo. 30; 12 Wend. 41.)

*Ensworth & Bassett*, for respondent.

I. The allegations in the appellant's petition do not amount to a contract, but merely to a privilege (26 Mo. 52-53.) There is

no consideration alleged as passing from appellant to respondent to uphold the allegations as a contract.

II. Appellant did not apply to redeem the lot within a reasonable time. (4 U. S. Dig. 86, 87, No. 548 ; 3 Bibb, 331 ; Chitty on Cont. 730.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity, brought by the plaintiff against the defendant, to set aside a conveyance made at trustee's sale, upon the payment of a certain amount of money which the plaintiff owed to the defendant, and which the property was conveyed to satisfy. It appears from the record that in 1858 the defendant loaned to the plaintiff the sum of four hundred and eighty dollars, which was secured by a deed of trust on a lot situated in Smith's addition to the city of St. Joseph. The loan was made on a credit of twelve months, and the plaintiff, being in embarrassed circumstances, was unable to pay ; therefore, on the 13th day of May, 1863, the defendant caused the property to be sold under the deed of trust, and became the purchaser of the same for the sum of five hundred dollars. It is conceded that this was the full value of the lot at the time. The plaintiff states in his petition that, prior to the sale, the defendant told him that she was having the property sold, that she might have its legal title in herself, but that she did not intend to hold it against him or any other person he might convey it to, provided the amount of the debt and the interest thereon were paid to her in a reasonable time, and that he need not give himself any uneasiness about it, if he could get the money and pay her in any reasonable time. The petition further avers that, resting under assurance thus given by defendant, the plaintiff made no effort to prevent the sale of his property, or to get persons to attend the sale, or to make the property bring more than the defendant saw fit to bid for it—one or both of which he would have done had it not been for the understanding he had with the defendant. He also states that, in the spring of 1865, within a reasonable time, he offered to redeem the property, but defendant objected, and that in April, 1866, he tendered the defendant, in legal-tender notes of the United States,

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McNew v. Booth.

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the amount of her debt and interest, and demanded a reconveyance of the property, when she refused to receive the money or convey the property.

The defendant, in her answer, states that she purchased the lot in good faith, with the sole purpose of investing herself with the title to her own proper use and behoof, and that she was not in any way bound, by promise or otherwise, to let the plaintiff have the lot, and that he made no effort to obtain a conveyance of the same till near three years had passed after the sale. She admits that she stated in a conversation that she did not intend to hold the title against the plaintiff, or any other person to whom he might convey it, if the amount he owed her was paid in a reasonable time, and says that she would have been glad if he had paid the money and taken the lot for fifteen or eighteen months after the sale, for she could not sell it for more than five or six hundred dollars during that time. She denies that she made any assurance or representation to plaintiff that should in any manner have prevented him from paying his debts and protecting his property by getting persons to attend the sale or otherwise. On the trial, both the plaintiff and defendant were sworn as witnesses, and their evidence was in substantial corroboration of the petition and answer. There was some other testimony given, but not materially changing the effect or purport of that given by the parties. It showed an understanding by the witnesses that the plaintiff was to have the property conveyed back to him, if within a reasonable time he paid the defendant the amount of the debt and interest which he owed her. The evidence is inconclusive and wholly insufficient to show that there was ever any express agreement or contract between the parties in relation to the matter. The defendant did not want the lot; she wanted her money, and the property was considered an inadequate satisfaction for her demand till some two years after the sale by the trustee, when it enhanced in value. In her testimony, she says that after the sale she tried to sell the lot, and asked the plaintiff if he would take it back and pay her the money, and he replied that he did not have the money, and did not think he would ever be able to own property in St. Joseph, and that he was going to leave the place. After this

declaration on his part, had she not a right to believe that he had abandoned all intention of attempting to re-acquire the title to the lot? It is a well-settled principle of equity law that where a purchaser becomes such, under such circumstances or state of facts as would make it a fraud to permit him to hold on to his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtains it at a sacrifice, the court will relieve against such fraud; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby. (Rose v. Bates, 12 Mo. 30; Slowey v. McMurray, 27 Mo. 118; Estill v. Miller, 3 Bibb, 177; Brown v. Lynch, 1 Paige, 147; Flagg v. Mann, 3 Sumn. 486; Allen v. McPherson, 1 Phil. 133; 5 Beav. 469; 1 H. L. Cas. 191; Hill on Trust. 144, *n*; Rutherford v. Williams, *ante*, p. 18.)

But is there any evidence in the present case showing that the defendant obtained the property by means of any fraudulent act, or that the retention of it by her would be unconscionable? She employed no means to decry the value of the property or to prevent bidding or competition at the sale. The remark that she made to the plaintiff, that she would convey the property back to him if within a reasonable time he would pay her the amount he owed her, was a mere gratuitous offer, intended as a kindness and privilege to him. It does not appear to have been made for any sinister or unfair purpose, and she gained no advantage thereby; for it is fully proved, and stands admitted, that she bade the full value of the property at the sale.

The most, then, that the plaintiff had any right to rely on, was to avail himself of this privilege of paying the money within a reasonable time and obtaining a reconveyance. What is to be considered a reasonable time cannot be definitely settled as a rule applicable to all cases alike.

Special circumstances must be taken into consideration when the question comes to be applied to any given case. The situation of the parties and the character of the property must be taken into account in affixing the proper standard. The defendant, in

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her answer, states that she was ready and willing to let the plaintiff have the property at any time within fifteen or eighteen months after she had purchased it, and it clearly appears that the plaintiff was not ready or willing to pay the money within that time. Surely this was extending the time to the utmost limit, and giving far greater indulgence than the law would imply. Had the defendant become possessed of the property in such a way that the law would have held her a trustee, time would have made no difference, and she could only have relieved herself by doing equity; but as we have come to the conclusion that she did not get the title clothed or impressed with any trust, we think that a reasonable time had expired long before the plaintiff made any effort or evinced a willingness to comply with her proposition.

With the concurrence of the other judges, the judgment will be affirmed.

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WILLIAM TARWATER, Respondent, v. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Railroad Companies—Negligence—Pleading—Counter claim.*—Where suit was brought against a railroad company for damages in killing a horse, and the answer merely alleged that plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that, by means of that act of gross negligence on the part of the plaintiff, the animal got on the track and was run over, whereby the cars were thrown off the track and injured to the amount of \$5,000: *held*, that the answer contained no special defense to plaintiff's cause of action, nor a counter claim in the nature of a set-off. It was simply a counter claim, in the nature of a cross action, and was properly stricken out on motion. The counter claim, as an independent cause of action arising out of the same transaction, stated no additional facts which, those in the petition being admitted, would have entitled defendant to a several judgment against plaintiff.
2. *Railroad Companies—Stock—Uninclosed Lands.*—Under the decisions of this court, plaintiff had the lawful right to turn out his horse upon the uninclosed lands adjoining the railroad.
3. *Negligence—Pleadings—Averments.*—Whether or not a given state of facts amount to negligence, or to any proof of negligence, is a question of law. And an averment that an act was done carelessly and negligently, so far as it goes beyond a bare statement of the facts themselves, avers a matter of law only, of which the court, and not the party himself, must be the judge.



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Where the answer sets up as a defense the negligence of plaintiff, it should be alleged as a main fact, which might be proved by evidence of other facts and circumstances from which negligence might be inferred by a jury.

4. Railroad companies may be liable in these cases for unavoidable accidents or simple misadventure, but the owner of cattle in such case would not be liable; but otherwise, where one willfully drives cattle upon a railroad track.

*Appeal from Caldwell Circuit Court.*

*Hall & Oliver*, for appellant.

I. The answer alleged negligence on the part of the plaintiff. Plaintiff's motion to strike out defendant's answer admitted the allegations contained in it. If either party, by his negligence, contribute to the catastrophe, he must suffer the consequences. (*Kennedy v. North Missouri R.R. Co.*, 36 Mo. 363; *Brown's Leg. Max.* 201-2; 37 Mo. 549; 36 Mo. 487.)

II. The statute concerning fencing railroads does not authorize a plaintiff to recover when his own negligence contributed to the injury. (*Gorman v. Pacific R.R. Co.*, 26 Mo. 449; *March v. New York & Erie R.R. Co.*, 14 Barb. 365; *Corwin v. New York & Erie R.R. Co.*, 13 N. Y., 3 Kernan, 42; *Redf. on Rail.* 368, note; *Pierce on Rail.* 336.)

III. The answer sufficiently set up the negligence of the plaintiff. All that is required is to aver negligence, and on the trial the court will determine whether the evidence offered tends to prove the allegation. (*Hann. & St. Jo. R.R. v. Kenney*, 41 Mo. 271.)

IV. The claim of damages, on the part of defendant, does not render the answer defective. (*Yallaly v. Yallaly*, 39 Mo. 490; *Kinney v. Muller*, 25 Mo. 579.) Under our practice act, defendant may set up as a counter claim any cause of action arising out of the transaction set forth in the petition, as the foundation of plaintiff's claim, or connected with the subject of the action, whether the amount claimed by defendant be liquidated or unliquidated. (*Gen. Stat.* 1865, p. 659, §§ 12, 13; *Ballman v. Pierce*, 3 Hill, 174; 1 Van Sandford's Plead. 545; 18 Mo. 161; 19 Mo. 125; 30 N. Y. 383; *Holzbauer et al. v. Heine et al.*, 37 Mo. 444.) The design of the practice act was to determine all controversies respecting the subject matter of litigation in one action. (*Dobin v. Pierce*, 2 Kernan, 156, 165.)

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*McFerran*, for respondent.

I. Appellant's answer admits negligence on its part in killing respondent's horse, and all the facts constituting defendant's cause of action for unliquidated damages. (*Powell v. Hann. & St. Jo. R.R. Co.*, 35 Mo. 460; *West v. Hann. & St. Jo. R.R. Co.*, 34 Mo. 177; *Brown v. Hann. & St. Jo. R.R. Co.*, 33 Mo. 311.)

II. The matter set up in appellant's answer cannot be pleaded in bar, or as a set-off, or as recoupment, or as a counter claim, or defense. (1 Chit. Plead. 555, 599; 13 Mo. 517; *House v. Marshal*, 18 Mo. 368; *Nelson v. Johnson*, 25 Mo. 430; *Grand Lodge v. Knox*, 20 Mo. 433; *Hall v. Clark*, 21 Mo. 415; *Pratt v. Menkins*, 18 Mo. 158; *Brake v. Corning*, 19 Mo. 125; *Johnson v. Jones*, 16 Mo. 494.)

III. Appellant's answer fails to set up any facts constituting negligence in the respondent.

HOLMES, Judge, delivered the opinion of the court.

This was a suit under the statute (Gen. Stat. 1865, ch. 63, p. 343) for damages in killing a horse of the plaintiff which had got on the track of the railroad, and was run over by the locomotive and train, in a part of the road that was not inclosed by a lawful fence, and was not at the crossing of a public highway.

The answer contained no specific denial of the allegations of the petition. It merely alleged that the plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that by means of that act of gross negligence on the part of the plaintiff the animal got upon the track and was run over, whereby the cars were thrown off the track and injured to the amount of \$5,000, and that the injury done to said stock was the same injury mentioned in the plaintiff's petition; and the defendant asked judgment against the plaintiff for that sum as damages.

This answer was stricken out, on motion of the plaintiff; and, the defendant failing to file any further answer, the plaintiff

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had judgment by default, which was affirmed on appeal to the Fifth District Court, and the case is now brought by appeal to this court.

This answer contained no special defense to the plaintiff's cause of action, nor was it a counter claim in the nature of set-off. It seems to have been intended as a counter claim existing in favor of the defendant, and against the plaintiff, between whom a several judgment might be had in the action, and as a cause of action arising out of the same transaction, on which the plaintiff's petition was founded. (Gen. Stat. 1865, ch. 165, p. 313.) It was simply a counter claim in the nature of a cross action. (Tiffany's N. Y. Prac. 378.) We think the court below committed no error in striking out the answer. The facts stated in the petition, and the case thus shown against the defendant, stood confessed for want of denial, after specific allegations made. The counter claim, as an independent cause of action arising out of the same transaction, stated no additional facts which, if true, and notwithstanding that the facts stated in the petition stood confessed as true also, would have entitled the defendant to a several judgment against the plaintiff. The negligence alleged against the plaintiff is made to consist only in his turning out the animal upon the uninclosed lands adjoining the railroad, and thus allowing it to get upon the track. In this, he did no more than he had a lawful right to do, according to the previous decisions of this court. (Gorman v. Pacific R.R. Co., 26 Mo. 441; Clark v. Hann. & St. Jo. R.R. Co., 36 Mo. 119.)

He was not bound to keep his cattle within inclosures. He had a right to allow them to range on the open prairie. It is averred that this was done carelessly and negligently. But whether or not a given state of facts and circumstances amount to negligence, or to any proof of negligence, is a question of law. This averment, therefore, so far as it goes beyond a bare statement of the facts themselves, avers a matter of law only, of which the court, and not the party himself, must be the judge. (Callahan v. Warne, 40 Mo. 136; Curry v. Cabliss, 37 Mo. 334.) It is assumed, as a matter of law, that the facts stated raise a presumption of such negligence as would make the

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party liable. There is no distinct allegation of such negligence as a main fact, which might be proved by evidence of other facts and circumstances from which it might be inferred by a jury. In the case of *The Hannibal and St. Joseph Railroad Company v. Kinney*, 41 Mo. 271, the petition alleged that the defendant's mules wrongfully, and by reason of the defendant's negligence, entered upon the track and caused the damage. The particular facts were not stated. On demurrer, the averment was held to be sufficient. The court would not undertake to say by what evidence this averment might be sustained on the trial, and it was said that the question, what circumstances would amount to proof of negligence, or would show negligence, would more properly arise when the evidence should be produced. It was distinctly intimated, also, that if no other evidence of negligence were produced than the mere omission of the party to inclose his cattle, he would not be liable for the damage done to the railroad company by their straying upon the track where no fences were erected. The railroad company may be liable in these cases for unavoidable accidents or simple misadventure, but the owner of cattle, in such case, would not be liable. On the other hand, if a person should willfully drive his cattle upon a railroad track, another principle would be involved, for no one can charge another with damages which he has willfully brought upon himself, *volenti non fit injuria*. (*Corwin v. N. Y. & Erie R.R. Co.*, 3 Kernan, 42.) And accordingly the statute has provided that if any person shall ride, lead, or drive any horse or other animal upon such road, and within such fences and ground, other than a farm, crossing without the consent of the corporation, he shall, for every such offense, forfeit and pay a sum not exceeding ten dollars, and shall also pay all damages which shall be sustained thereby on the part of the aggrieved. (Gen. Stat. 1865, ch. 63, § 43.) The same general principle would be applicable if the same thing were done where there were no such fences.

Judgment affirmed. The other judges concur.

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Vickers v. Hann. & St. Jo. R.R. Co.—Mead v. McLaughlin et al.

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AARON B. VICKERS, Respondent, *v.* THE HANNIBAL AND ST.  
JOSEPH RAILROAD COMPANY, Appellant.

1. Decision in case of Tarwater v. Hannibal and St. Joseph Railroad Company (*ante*, p. 193) affirmed.

*Hall & Oliver*, for appellant.

*McFerran*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This case is similar to that of Tarwater v. The Hannibal and St. Joseph Railroad Company, decided at this term, and it will be governed by the decision in that case.

Judgment affirmed. The other judges concur.

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EGBERT MEAD, Respondent, *v.* PATRICK McLAUGHLIN AND  
PHILANDER A. HUXLEY, Appellants.

1. *Deed of Trust—Sale—Payment by Note; when considered Cash.*—The terms of a deed of trust required that the real estate therein mentioned should be sold "for cash." Subsequent to the execution of the deed, and prior to the sale, the property became encumbered with various liens. At the sale, the purchaser paid for the property only a portion of the sum named as the purchase money, but gave his notes to the holders of the liens for the balances due them, over and above the amounts realized by them at the sale; and, in consideration of these notes, the lien-holders yielded up all their claims against the maker of the deed of trust: *Held*, that the notes so given were equivalent to cash placed in the hands of the trustee.
2. *Trustee—Purchase—Priority of Lien.*—The rule requiring the trustee to manage the trust estate for the benefit of his *cestui que trust*, would not prevent his purchasing a lien against the estate, when this lien was subsequent, in point of time, to the execution of the deed under which the trustee acted, and to all other liens on the property. It was the interest of the trustee, in such case, to make the property realize not only the amount of the lien so purchased by him, but of all other liens which were prior and superior to his own.



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Mead v. McLaughlin et al.

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*Appeal from Fifth District Court.*

*Ensworth, and H. M & A. H. Vories, for appellant.*

I. The debts of plaintiff were cash debts, and were taken up and satisfied in part by notes of Huxley, the purchaser; and the balance of the purchase money, not so paid by Huxley, he paid to the trustee, in cash. The notes given by Huxley, in part satisfaction of the notes of Mead, were received by the owners of the notes of Mead, secured by the deed of trust, in full payment of the same; and the notes thus paid were delivered over to the trustee, which was a cash payment. (*Appleton v. Kennon*, 19 Mo. 637; 10 Barb. 372; 10 N. Y. 440; *St. John v. Purdy*, 1 Sandf. 9; 2 Duer, 133; 3 E. D. Smith, 54; 5 Wend. 85.)

II. When a trustee purchases an outstanding claim against the trust estate, and attempts to enforce it by judgment and execution sale, the court will grant an injunction to stop proceedings, because the trustee, having taken charge of the property under the trust, must protect it, and cannot act in any way but under the trust and the rules in the writing making the trust; but there is no case, when a court ordered a resale, where a third person, entirely disconnected with the interest of the trustee, made the purchase of the property.

*Hall & Oliver, and Jones & Townsend, for respondent.*

I. A trustee is never permitted to raise in himself an interest opposite to that of his *cestui que trust*. McLaughlin violated the rule when he purchased a lien on the trust property for his own benefit. An independent interest in a trustee, in the subject of the trust, is in its very nature an interest hostile to the *cestui que trust*. (*Fisk v. Sarber*, 6 Watts & S. 18, 31, 35; *Van Horn v. Fonda*, 5 Johns. Ch. 408; *Conger v. Ring*, 11 Barb. 363, 364; 1 Lead. Cas. Eq. 71.) The rule here stated is a fundamental doctrine in equity. (5 Johns. Ch. 408; *Page v. Nagh*, 6 Cal. 244; 3 Ves. 740, *n.*)

II. A trustee who is intrusted to sell and manage for others, undertakes, at the same moment in which he becomes a trustee,

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not to manage for the benefit of himself. This rule is enforced with unrelenting rigor. Its object is to afford the *cestui que trust* the most ample protection against fraud and injustice, and to remove out of the way of the trustee all temptation to violate his duties. (Conger v. Ring, 11 Barb. 364; Whitecote v. Laurence, 3 Ves. 740, n. a; Wade v. Pettebone, 11 Ohio, 57.) And the rule embraces not only purchases of the trust estate by the trustee, but also purchases by the trustee of securities upon it for his own benefit. (Green v. Winter, 1 Johns. Ch. 36; 6 Cal. 744.)

III. If the trustee becomes a creditor under the deed of trust, either by purchase of the debt himself, or by his being constituted the executor or administrator of the creditor, it becomes necessary to go into equity to enforce the security, and it assumes the character of a mere mortgage. (1 Tucker's Com. 104.) If, then, McLaughlin had bought either of the notes secured by the deed of trust in this case, he could not have sold the property in suit to a purchaser with notice, so as to defeat plaintiff's equity of redemption. His purchase of the mechanic's lien for his own benefit worked an equal disqualification of his powers of sale. It created in him an interest hostile to that of plaintiff. (6 Cal. 744.)

IV. McLaughlin was directly interested in Huxley's purchase of the property in suit. By that purchase, his fourth lien, subject to Mrs. Mead's dower, was converted into first lien, discharged of dower. It is a rule that when a trustee of any description sells an estate, and becomes himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled, as of course, to have the sale set aside, and it makes no difference in the application of the rule that the sale was at public auction, in good faith, and for a fair price. This rule invalidates every indirect, as it does every direct, transfer to the trustee for his use. The principle applies, however innocent a purchaser may be in a given case. (4 Kent's Com. 438; 1 Story on Eq. § 322; 1 Lead. Cas. in Eq. 160, 161; Abbott v. American Hard Rubber Company, 33 Barb. 593, 594.)

V. McLaughlin's sale to Huxley was not for cash, but partly

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for cash and partly on credit. Such a sale was not authorized by the deed of trust. It is the plain and settled rule that the conditions annexed to the exercise of the power must be strictly complied with. They are incapable of admitting any equivalent or substitution. The courts have been uniformly and severely exact on this point. It is not competent for a trustee to depart from the conditions of his power, although he might, by doing so, in reality promote the interest of those for whom he acted. (4 Kent, 330, 331; *Greenleaf v. Queen et al.*, 1 Pet. 145; *Sugd. on Powers*, 211.)

VI. Courts of equity, in the exercise of that vigilance which they employ for the protection of trusts, extend their control not only over the acts of trustees, but over the acts of those also who participate in the transaction; who aid and assist in the violation of the trust; who enable the trustee to violate it. It is a general rule that when the trustee does not act in pursuance of the trust, but in violation of it, even if he is within the letter of his power, those who co-operate with him in enabling him to defeat the trust are responsible for it. (*Wallis v. Thornton's Adm'r*, 2 Brock. 433.)

FAGG, Judge, delivered the opinion of the court.

This is an application on the part of the respondent to be permitted to redeem certain property, situate in the city of St. Joseph, which had been sold by McLaughlin under the authority of a deed of trust, and purchased by Huxley; and also containing a prayer for an account of the rents and profits of the same from the day of sale. The judgment of the Court of Common Pleas being for the defendant below, the same was reversed, upon a writ of error to the Fifth District Court, and the cause is now brought here by appeal. It appears that the deed under which the sale was made was executed by the respondent Mead and his wife, to secure the payment of three promissory notes, in favor of Mr. John E. Barrow, each for the sum of \$200, payable respectively six, twelve; and eighteen months after date. Upon default made by Mead in the payment of the notes, the trustee is directed to sell the property for cash, after giving twenty days' notice, con-

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taining the terms and description of the property, by advertisement in a newspaper published in the city of St. Joseph. The petition itself shows that default was made in the payment of the notes, and that McLaughlin, on the 10th day of April, 1862, sold the property at public sale; that Huxley became the purchaser of the same for the sum of \$2,055, and some time afterward received a deed therefor. It is charged that there was no compliance with the requirements of the deed of trust, either in the giving of the notice or in the terms of sale.

It is admitted that there were several subsequent liens upon the same property, amounting in the aggregate to about \$1,050, one of which, and the last in the order of procedure, had been purchased by McLaughlin and one Richardson, his partner in business, subsequent to the execution of the deed of trust by Mead. The property is described as lot number four (4) in block forty-three (43) in Patee's addition to the city of St. Joseph. It is charged that the said property was sold partly for cash and partly upon credit; that this was in pursuance of an arrangement made by Huxley with the owners of these several liens, including McLaughlin and Richardson, whose claim amounted to the sum of \$385.62, and also with the owner and holder of the promissory notes secured by the deed. It is further alleged that this arrangement was fully consummated by the parties, Huxley having only paid the sum of \$860 cash, and executed his notes to the owners and holders of these liens for the respective balances due to each, after a division of the money so paid among them, in proportion to the amount of their several claims; that all this, with the execution of the deed to Huxley by McLaughlin, constituted one and the same transaction; that in pursuance further of this arrangement, and as part of the same transaction, a mortgage was executed by Huxley and wife upon the same property, to secure the several notes which had been executed to these parties under this agreement.

There are some other allegations in reference to the depression of property in St. Joseph at that time, the number of bidders at the sale, and the amount of money received by Huxley for the rent of the property, that we do not deem it necessary to notice specifically.

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Huxley is also charged with specific knowledge, at and before the sale, of all the facts set out in the petition, and further, that the said arrangement was made by him and McLaughlin so as to enable said Huxley to buy said property, to the exclusion of others who might desire to purchase the same, and to give said Huxley an advantage over other bidders at said sale; and that said sale was wrongfully made on the part of said Huxley and McLaughlin, so as to secure to Huxley the purchase of said property, on the terms and conditions before stated, partly for the benefit of said McLaughlin, which were known only to defendants and the owners of said liens.

To this petition there were separate answers filed, 'denying specifically all allegations of wrongful and corrupt dealing with the property by the trustee, or any knowledge of or participation in the same by the purchaser, and alleging a compliance in all respects with the terms and requirements of the deed.

The testimony in this case is somewhat voluminous, and need not be examined in detail. The notice given by the trustee of the sale seems to have been in compliance with the requirements of the deed. All the estimates made by the witnesses, with one exception, of property in St. Joseph at the time of the sale, concur in placing the amount at which this property was sold at something more than its actual market value.

The arrangement alleged to have been made by Huxley with the owners of the several liens upon the property is made somewhat conspicuous in the argument of the case, for the purpose of proving that the trustee failed to comply with the requirements of the deed as to the terms of the sale. A careful examination of the facts proved will show most conclusively, we think, that there was no such failure. The payment of the liens upon the property, as made by Huxley, were certainly equivalent to cash placed in the hands of the trustee. They operated to extinguish the debts due by Mead to these several parties, and this is all that he could have required of the trustee. They are admitted by the petition to be due, and at the time constituted valid and subsisting liens upon the property. McLaughlin was, therefore, fully authorized to pay them off, and could have done so without any



ground of complaint on the part of Mead if the purchase money had been paid to him in full by Huxley. Even though there had been no admission of the existence of these liens, still, if they had existed in fact, the trustee would have been fully protected in paying them if he had thought proper to do so. In point of fact there was no credit given to the purchaser for any portion of the purchase money. It was a loaning of the several sums of money by the owners of the several liens, and could have been done with as much propriety before the sale as it could afterward. The evidence shows that this arrangement was not made at the instance of the trustee or his partner in business. It was made by the others, and assented to by him, with no intention, as far as the proof shows, or the circumstances will warrant us in believing, of departing from the requisitions of the deed. The effect of this arrangement was, whatever may have been intended by the parties, to make the property bring as much as the amount of all these liens put together, and fully as much as it was worth. It is presumed that the intention of the owners of these liens was to do that, and the proof goes very far to show that without some such arrangement the property would not have sold for as much as it actually did. The whole tendency of it would seem to be to increase the chances of realizing a larger sum than could otherwise have been obtained for the property. The question may very well be asked, then, who was injured by the transaction? Certainly, it was not the *cestui que trust*. The testimony shows that the lien owned by McLaughlin and Richardson was acquired before the trustee had any knowledge of his appointment. It was bought at par, and there is no circumstance that tends to show that the trustee intended to use his position for the purpose of speculating in the debts and liabilities of Mead, or that the possession of this claim placed any temptation before him to deal improperly with the property conveyed to him. After default made in the payment of the notes secured by the deed, he had no discretion in fixing the time for the sale of the property. He was bound to proceed with the sale whenever the holder of the notes should require it. He says that the sale was not made on account of any anxiety on his part in reference to his own claim, but at the solicitation of

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the holder of the notes ; that the purchaser Huxley was a stranger to him, and his prejudices were rather against him and in favor of one McGuire, who occupied the property at that time. It is not perceived that any advantage was given, or was intended to have been given, to the purchaser over any other party desiring to bid. McGuire is the only witness in the case that places a higher estimate upon the value of the property than the sum it actually sold for, and there are many circumstances to weaken, if not entirely destroy, his testimony. It is enough, however, that the whole weight of the evidence is against him, and the fact must be found in opposition to his statements.

The chief ground upon which the counsel for the respondent seem to rely in support of his application for relief in this case is, that in the purchase by the trustee of the debt against Mead, and which constituted a lien upon the property in question, he had raised in himself an interest opposite to that of his *cestui que trust*. The general principles of equity, as stated in the argument of counsel, are all conceded, but we think are without application in the case at bar. It should be borne in mind that this lien was subsequent, in point of time, to the execution of the deed under which the trustee acted. The lien was merely an incident to the debt, and certainly constituted no inducement to the trustee to force the property to sale at a time when it was likely to be sacrificed. The interest of the trustee, then, was to make the property bring not only the debt secured by the deed, but also all the debts, which were prior liens, and superior to his own. It is true that he could not purchase the trust property, nor would he be allowed to acquire any interest in it, opposed to the interest of the party for whom he was acting in this confidential capacity, or such as would place before him a temptation to act wrongfully in the execution of the trust.

But we fail to see any ground of complaint in this case, because the satisfaction of his debt resulted simply from the fact that the proceeds of the sale, fairly made, and really without any objection on the part of the respondent, were sufficient to satisfy all the liens which were admitted to exist against the property.

The rule requiring a trustee to manage the trust estate for the

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benefit of his *cestui que trust* would preclude him from acquiring any interest, or doing any act, which would be advantageous to himself and prejudicial to the other. Hence he could not compound debts and mortgages, or buy them in for less than the amount due, so as to take any benefit to himself. In all such cases, the *cestui que trust* may require him to account for all profits and benefits acquired. Nothing of that sort, however, is asked for in this case, and it is useless to inquire into the amount paid by the trustee for the lien which he acquired. As to the prosecution of any of these liens to judgment after the sale of the property, we do not deem it necessary to say anything except that the evidence shows that the parties themselves considered them all as satisfied and extinguished by the arrangement made with Huxley; and it cannot affect the question of the right of Mead to redeem the property. There is no doubt about the liability of a trustee to account for all sums of money unnecessarily expended by him out of the trust funds. If any cause of action exists against the trustee, growing out of any misapplication of the funds in his hands, the *cestui que trust* is not concluded by the decision of this case, but may still have his remedy against him.

The judgment of the District Court must be reversed, and the judgment of the Court of Common Pleas affirmed. The other judges concur.

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STATE OF MISSOURI, Appellant, v. MINOR SEWARD, Respondent.

1. *Assault to Kill — Indictment — Averments — Construction of Statute.*—An indictment alleging that defendant, "feloniously, on purpose, and willfully," etc., "did then and there make an assault with the intent him, the said," etc., "then and there to kill," etc., but omitting to charge that the offense was committed "with malice aforethought," would be fatally defective under section 29, chapter 200, Gen. Stat. 1865, but is good and sufficient within the terms and meaning of section 32 of the same chapter. That the prosecutor used some of the terms embodied in section 29, such as "on purpose, and with a deadly weapon," is not to be regarded as absolutely conclusive that the indictment can be founded on that section only. These words may be treated as mere surplusage, and there will still remain a complete and sufficient description of an offense as designated in section 32.

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*Appeal from Andrew Circuit Court.*

This is a case where defendant was indicted, at the October term, 1866, of the Andrew county Circuit Court, for an assault with intent to kill. At the April term, 1867, of said court, he filed his motion to quash the indictment, and the same was sustained. The State then took the case to the Fifth District Court, where the ruling of the Circuit Court for Andrew county was affirmed; and the case is now brought to this court by appeal.

*J. C. Parker*, for appellant.

I. It is not necessary that an indictment for an assault with intent to kill, under § 32, pp. 780-81, Gen. Stat. 1865, should aver that the offense was committed "of malice aforethought." (State v. Johnston, 4 Mo. 618; State v. Thompson, 30 Mo. 470; State v. Stewart, 29 Mo. 419; State v. York, 22 Mo. 462; Jennings v. State, 9 Mo. 862; State v. McGrath *et al.*, 19 Mo. 678.)

*Vories & Vories*, for respondent.

I. The indictment is clearly founded on section 29, chapter 200, Gen. Stat. 1865, and, failing to use the descriptive words, "with malice aforethought," is clearly bad. (State v. Comfort, 5 Mo. 357; Humphries v. State, 5 Mo. 203; State v. Harris, 34 Mo. 347.)

II. Section 32 is designed to punish offenses not before defined or provided for; and plainly this indictment attempted to describe an offense provided for in section 29, but described the offense imperfectly.

WAGNER, Judge, delivered the opinion of the court.

The sole question in this case is whether the court committed error in sustaining the demurrer to the indictment. The indictment contains but one count, and alleges that the defendant, with force and arms, upon the body of one Edward Carter, then and there being, feloniously, on purpose, and willfully, with a deadly weapon to-wit: a double-barreled shot gun, loaded with gun-

powder and leaden balls, which he, the said Minor Seward, then and there had and held, did then and there make an assault, with the intent him, the said Edward Carter, then and there to kill, contrary, etc. The objection stated in the demurrer, upon which the court held the indictment bad, was, that it did not charge that the offense was committed on purpose and with malice aforethought. The decision of the court below was made on the hypothesis that the indictment was framed on the twenty-ninth section of chapter two hundred of the General Statutes, and that it could not be applied to the thirty-second section of the same chapter. The omission to state that the act was done with malice aforethought would be a fatal defect within the meaning of the twenty-ninth section, as has been repeatedly held by the decisions of this court. (*State v. Comfort*, 5 Mo. 357; *State v. Harris et al.*, 34 Mo. 347.)

But the next question is, whether the indictment does not sufficiently set out an offense under the thirty-second section. It is immaterial what section was in the mind of the pleader when the indictment was drawn, or on what particular section he intended to base it, provided that a sufficient description is set out as to any offense created or recognized by the statutes.

The thirty-second section provides that every person who shall be convicted of an assault with intent to kill, or to commit any robbery, rape, burglary, manslaughter, or other felony, the punishment for which assault is not previously prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or the county jail not less than six months, or by both fine and imprisonment. The punishment for the offense set forth in the indictment is not before prescribed, for there is no offense described according to the twenty-ninth section; but the indictment is good and sufficient within the terms and meaning of the thirty-second section. That the prosecutor used some of the terms embodied in the twenty-ninth section, such as "on purpose, and with a deadly weapon," is not to be regarded as absolutely conclusive that it can be founded on that section only and can be applied to no other. These words may be wholly stricken out and taken to be mere surplusage, and there will still remain a



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complete and sufficient description of an offense as designated in the thirty-second section.

We think the court erred in sustaining the demurrer, and the judgment will be reversed and the cause remanded. The other judges concur.

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LEWIS SMITH, Respondent, *v.* ADAM LYDICK, Appellant.

Judgment affirmed.

*Error to Livingston Circuit Court.*

*Hall & Oliver*, for plaintiff in error.

*McFerran & Collier*, for defendant in error.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff recovered judgment against the defendant, in an action of claim and delivery, for the value of a mare and colt. On appeal to the Fifth District Court the judgment was affirmed, and the defendant appeals to this court.

It is contended that the court below erred in giving and refusing instructions, and more particularly in refusing the instructions asked for by the defendant. It is not denied that an actual possession, which is a lawful one, is evidence of title as against any one who does not show a better title; but it is insisted, on the part of the defendant, that there was evidence before the jury tending to show that the mare had been captured from the public enemy before she came into the possession of the person from whom the plaintiff had purchased her, which might furnish a proper basis for the instructions refused for him. Upon examination, we are satisfied that there was no sufficient evidence for that purpose.

It seems that the plaintiff had admitted in conversation with some of the witnesses, after the mare had been taken out of his possession by the military authorities of the State, that she was

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"contraband." It would be difficult to say what he meant by this. It appears that the militia men called her by that name. It furnishes no proof that the mare had been captured from the public enemy, nor that, if she had been, the person from whom the plaintiff bought her for a valuable consideration, with delivery of possession, had not acquired a valid title from the captor. It had no proper tendency to rebut or disprove the *prima facie* title shown by the plaintiff. We conclude, therefore, that there was no error in refusing the instructions. The instructions given for the plaintiff placed the issue fairly before the jury, and we see no good reason for disturbing the verdict.

Judgment affirmed. The other judges concur.

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THE STATE OF MISSOURI *ex rel.* GRAHAM ODDLE, Appellant, *v.*  
JOHN D. SHERMAN, Respondent.

1. *City Ordinances—City Charters—How set forth in pleading.*—Where a party asserts a right founded upon provisions of city or town ordinances, the pleading must set forth those provisions, in whole or in substance. The courts cannot take judicial notice of such ordinances. But when the material allegations of an information were founded upon a city charter, and the act was pleaded by its title, the court, under section 40 of the practice act (Gen. Stat. 1865, p. 661), could take judicial notice of its provisions.
2. *Quo Warranto—Office of City Treasurer—Information relating to—Pleading—What Averments sufficient.*—Where, by the terms of a city charter, the corporate powers were vested in a mayor and councilmen, to be elected by the qualified voters of the city, and power was expressly given to the mayor and council to appoint a city register, collector, and such other officers as they might at any time deem necessary, the averment contained in an information claiming the office of city treasurer, that the mayor and city councilmen had been duly elected, and the relator duly appointed and qualified, was a sufficient allegation of these main facts. If there were any ordinances defining the manner of election or appointment, it would devolve upon defendant, under the pleading, to produce them, and show that either the election of the mayor and councilmen, or the appointment of the treasurer, had not been conducted in conformity therewith, when the relator had first produced sufficient *prima facie* evidence to sustain his information.
3. *Practice—Pleading made more definite, at whose instance—Construction of Statute.*—The provision of the practice act (Gen. Stat. 1865, chap. 165, § 20) that the court may require a pleading to be made more definite and certain, would seem to imply that it must be done on motion of the adverse party.

*Appeal from Fifth District Court.*

The facts material to the case appear in the opinion of the court.

*Asper & Pollard*, for appellant.

I. The court below erred in reversing the judgment of the Circuit Court on the ground that the information did not set out the ordinance of the city of Chillicothe by which the office of treasurer was created, for the following reasons: 1. The charter, which is well pleaded, gives ample authority to appoint or elect a treasurer, and no ordinance is required to create the office. The reference to the ordinance No. 8 is mere surplusage. Section 23 of the charter of Chillicothe—printed charter and ordinances, p. 6—reads as follows: “The mayor and board of councilmen shall have power to appoint a city register, assessor, collector, and such other officers as they may at any time deem necessary, who shall be sworn faithfully to discharge the duties of their offices, and shall, when required, give bond, with satisfactory security, to the corporation, for the due performance of their respective duties.” This section gives ample power to appoint; and the petition shows that the authority was pursued. 2. The information sets out that Graham Oddle was duly appointed to the office of treasurer of Chillicothe; that he qualified and gave bond, with security, which was approved by the council—which are facts that, if not denied, give him title to the office. These facts make a full and perfect title, and are admitted by the demurrer. If the information alleges that the relator was duly appointed and qualified, it contains facts sufficient. 3. In setting out this title it was not necessary to set out the ordinance creating the office or appointing the treasurer. The title sufficiently appears without it. General certainty is sufficient; and pleadings are to be liberally construed with regard to doing substantial justice. (Gen. Stat. 1865, p. 661, § 37; *Bersh v. Dittrick*, 19 Mo. 129; *Beman v. Tugnot*, 5 Sandf. 153; *How. Prac.* 267.)

II. The court below committed no error in sustaining motion

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of relator to strike out and make answer more definite and certain, because: 1. The answer denied the relator's title, and at the same time justified holding the office. The answer was inconsistent. It created an issue in which the relator held the affirmative, and at the same time stated another issue in which the respondent below held the affirmative. This is not allowable. (Gen. Stat. 1865, p. 659, § 14; *id.* p. 661, § 39; *Houston v. Lane*, 39 Mo. 495; *Darrett v. Donnelly*, 38 Mo. 492; *Adam's Adm'r v. Trigg*, 39 Mo. 141; *Burnet v. Wagner*, 39 Mo. 385; *Atterbury v. Powell*, 29 Mo. 429.) 2. That portion not stricken out was indefinite and uncertain, and the precise nature of the allegations or the denials was not apparent. The refusal to comply with the order of the court left the party without answer. He took leave to answer, and then refused to file one. (Gen. Stat. 1865, p. 660, § 20.)

*McFerran & Collier*, for respondent.

I. The second amended information does not state facts sufficient to constitute a cause of action. The appellant claims his right to the office of treasurer through certain ordinances of the corporation of the city of Chillicothe, referred to in his second amended information, but fails to set out said ordinances, or any part thereof; by reason of which the said information is not sufficient in law to support a judgment against said respondent. (*Mooney v. Kennett*, 19 Mo. 555; *Ang. & Ames on Corp.* §§ 719, 758; 1 *Blacks. Com.* p. 58, § 86; 1 *Chitty's Plead.* 247.)

II. The acts of usurpation by respondent are not set out, nor a vacancy alleged in the office at the time of the assumed appointment of appellant to the office, nor is there an allegation that the appellant was appointed as the successor of respondent in said office. (*Drome v. Scammel*, 7 Cal. 393; *U. S. Dig.* vol. 19, p. 588, § 15; *Ang. & Ames on Corp.* §§ 719, 758.)

III. The information must state the facts constituting the appellant's right to the office as his cause of action against the respondent. (Gen. Stat. 1865, p. 658, § 3; *U. S. Dig.* vol. 13, p. 559, §§ 1, 2; 23 *Wend.* 193; 4 *Cow.* 106, 108, 297;

Ang. & Ames on Corp. 719, 758 ; U. S. Dig. vol. 23, p. 446, and cases cited.)

IV. The information does not show any right in the mayor and councilmen to appoint appellant treasurer of the city of Chillicothe. It does not appear who composed the council that counted the vote and installed them into office as councilmen for said city. It must appear that a majority of the council was present, before the act can have any legal vitality. (2 Wheat. Sel. 1178, 1179.)

V. The court below had no power to require the respondent to make his answer more definite and certain, without specifying and deciding wherein it was indefinite and uncertain.

VI. The charter and amendments of the incorporation of the city of Chillicothe are not well pleaded in the second amended information. Said charter and several amendments thereto are referred to by their title and the day of their passage, which simply enables the court to take judicial notice thereof ; but it is not alleged in said information what act or acts were done by authority of the several statutes aforesaid respectively. (Gen. Stat. 1865, p. 661, §§ 40, 41.)

HOLMES, Judge, delivered the opinion of the court.

This was an information, in the nature of a *quo warranto*, filed in the Circuit Court of the county of Livingston. The information alleged, in substance, that certain persons named were, on the second day of April, 1867, duly elected mayor and councilmen of the city of Chillicothe, and that on the third day of May thereafterward the said mayor and councilmen appointed the relator treasurer of the city, and that he was duly qualified to and entered upon the duties of the office, but that the defendant had unlawfully usurped said office, and judgment of ouster was demanded against him. A demurrer to the information was overruled.

The first part of the answer consisted of specific denials of the material allegations of the information ; the second part contained a statement of the title and right under which the defendant claimed.

A motion to strike out certain portions of the answer, including the whole of the second portion, as above, was sustained, and the



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court required the defendant to make the remaining part more definite and certain. The relator's motion had assigned no reasons for striking out this part, nor in any way pointed out wherein it was deemed indefinite and uncertain. The defendant declining to amend his answer in this respect, a judgment by default was given against him as for want of an answer. Exceptions were duly taken. On appeal to the District Court, the judgment was reversed on the ground that the information was demurrable, and that the motion in arrest should have been sustained.

The first question concerns the sufficiency of the information. The objection was that it did not set forth the essential provisions of the city ordinances under which the election for mayor and city councilmen had been held and the relator appointed treasurer. There is no doubt that where the party asserts a right founded upon such ordinances, the pleading must set them forth in whole or in substance. The courts cannot take judicial notice of the ordinances of a town or city. (*Mooney v. Kennett*, 19 Mo. 555.)

But here the material allegations were founded upon the city charter. The corporate powers were vested by the charter in a mayor and councilmen, to be elected by the qualified voters of the city, and power was expressly given to the mayor and council to appoint a city register, assessor, collector, and such other officers as they might at any time deem necessary. (Act of March 1, 1855.) This act was pleaded by its title, in accordance with the statute (Gen. Stat. 1865, ch. 165, § 40), and in such manner that the court might take judicial notice of its provisions. The averment that the mayor and councilmen had been duly elected, and the relator duly appointed and qualified, was a sufficient allegation of these main facts. (*People v. Crane*, 12 N. Y. 433.) A lawful authority for these proceedings was contained in the charter. The minor details were more properly matter of evidence. If there were any ordinances defining the manner of election or appointment, it would devolve on the defendant, under this pleading, to produce them, and show that either the election of the mayor and councilmen, or the appointment of the treasurer, had not been conducted in conformity therewith, when

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the relator had first produced sufficient *prima facie* evidence to sustain his information. On this point we think the District Court was in error.

The next question is upon the action of the Circuit Court in requiring the defendant to make the remaining part of his answer more definite and certain, and in giving judgment against him by default on his failing to amend as required. On this point we observe that the relator's motion had given no reasons for this action, nor pointed out wherein this part of the answer was indefinite or uncertain. The motion related only to the portion which was stricken out by the court for the reasons specified. The statute requires that all motions shall be accompanied by a written specification of the reasons upon which they are founded, and that no reason not so specified shall be argued in support of the motion. (Gen. Stat. 1865, ch. 165, § 48.) The latter clause of the twentieth section of the same act (ch. 165, § 20) provides that the court may require a pleading to be made more definite and certain. It is not expressly said that it must be done on motion of the adverse party, though that would seem to be implied; but without undertaking now to lay this down as an imperative rule, we may remark that there is an obvious reason for such practice in the consideration that both the court and the other party would need to be informed in what particular respects, and in what part, the pleading was supposed to be defective. But it is sufficient for the purpose of this case that no good reason appears for requiring this part of the answer to be made more definite and certain. It consists merely in specific denials of the several allegations of the relator's information. It makes distinct issues of fact upon the election of the mayor and councilmen, and upon the appointment of the relator to be treasurer, which are the most material averments. We do not see that these denials need be more specific or certain than they are. We think, therefore, that the Circuit Court committed error in giving judgment by default for want of an answer.

Some other exceptions appear in the record which were not insisted upon in the argument, and which it is not deemed necessary to notice further. We observe only that the second part of

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the answer which was stricken out did not constitute a good special defense by way of confession and avoidance. (*Tiffany v. Smith*, 1 N. Y. 374-382; *Houston v. Lane*, 39 Mo. 495.)

For these reasons the judgment of the District Court, reversing the judgment of the Circuit Court, will be affirmed, and the cause remanded to the Circuit Court for further proceedings, in accordance with this opinion. The other judges concur.

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ARCHIBALD S. RUTHERFORD, Respondent, v. BENJAMIN ULLMAN,  
Appellant.

1. *Statute—Quieting Titles—Construction.*—In order to institute proceedings under the statute touching suits for quieting titles (Gen. Stat. 1865, p. 662, § 53), the petitioner must be in actual possession of the premises; the object of the petition being, not for the purpose of settling the title in the first instance, but only preliminary to an action which the defendant or adverse claimant may be ordered to bring for that purpose.
2. *Statute—Attornment—Possession.*—Under section 15 of Gen. Stat. 1865, p. 740, giving a key of premises to a third party by a tenant, without the consent of his landlord, is a void attornment, and in no wise affects the possession of the landlord.

*Appeal from Fifth District Court.*

*Vories, Hill, Woodson & Jones*, for appellant.

I. The statute under which this proceeding was had was only intended to give a party a remedy, where he owned land and was in undisturbed possession thereof, by compelling a person who claimed to have some adverse title to assert it in the court and have the title quieted. But it was not intended to confer this right upon any one who was in a condition where he could bring an ejectment himself to try the title. If the adverse claimant was in possession of any part of the land, he could bring his suit against him, and did not need the statutory remedy.

II. There would be no just or equitable reason for compelling the defendant to sue, where the plaintiff could just as well sue as the defendant, the latter being in possession of part of the property. (Gen. Stat. 1865, p. 663, § 54; 31 Mo. 333.)

*Parker, Strong, Chandler & Sherman*, for respondent.

I. In this proceeding, title cannot be inquired into. The one in possession may institute this proceeding. (*Shultz v. Arnot et al.*, 33 Mo. 172.)

II. Though a person's premises are occupied by a tenant, it is the landlord's possession in fact and in law. He whom the law declares in possession, and not he whom it declares should be in possession, is the one we maintain to be the "actual possessor." If Ullman entered into the vacant room under plaintiff's tenant, it is still plaintiff's possession.

III. Whatever the testimony discloses the facts to be in relation to the transactions between defendant and plaintiff's tenant, the law is settled that "even an adverse claimant who gets into possession by tampering with the tenant cannot resist the landlord's claim where the tenant himself could not." (*Taylor Land. and Ten.* § 705, *n.* 7; 4 Watts & S. 188; 2 Binney, Pa., 468 · 6 *id.* 59-62.

IV. An action of ejectment brought to try the title to a single room will not try the title to the whole premises. Admit that defendant is not only in possession but the owner of that room, cannot the plaintiff, if in possession of the remainder, compel the defendant to try the title which he sets up against the plaintiff?

V. Plaintiff cannot maintain ejectment upon the facts of this lease; for ejectment is a possessory action, and the plaintiff cannot recover in such action if he is in possession (*Gen. Stat.* 1865, p. 606, § 8; 25 Penn. St. 399); nor if he is in possession of part (*Monroe v. Ward*, 4 Allen, 150-1).

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced by the respondent against the appellant, in the Court of Common Pleas for Buchanan county, under section 53, chapter 165, of General Statutes, providing for quieting titles. The plaintiff, in his petition, charged that he was the owner in fee of a certain lot in the city of St. Joseph, and was in lawful and peaceable possession of the same, and that he was credibly informed and believed that

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the defendant made some claim to the property adverse to the estate of the plaintiff; and prayed that the defendant might be summoned to show cause why he should not bring an action to try his alleged title, if he had any, to the said property. The defendant, in his answer, denied that the plaintiff was the owner in fee, or in the lawful or any other possession of the lot in controversy; but stated that the lot was the property of the defendant, and that the defendant, at the time of plaintiff's filing his petition, and for a long time before and ever after, was in the actual possession of a portion of the said lot, by himself and tenant, under a claim of right and title to the whole, adverse to the plaintiff, and that the plaintiff could have resorted to his action of ejectment to enforce his claim; and asked that the plaintiff be left to his remedy at law for the possession of the lot. The evidence, which is very brief, discloses distinctly that, for a number of years prior to the filing of the petition, the plaintiff was in possession of the whole lot by his tenants, who occupied the principal buildings on that lot; that a short time before the institution of this action, the defendant, Ullman, went to Mr. Williams, the plaintiff's tenant, who was in possession of the lot, and kept a store in the building situated thereon, and asked for the key to a small room that was in a building on the lot north of the house in which a store was kept; the room was empty, and he stated that he wanted to get into it. Mr. Williams gave him the key, and he went into the room and put an old woman into it, and ever afterward kept some one in, for little or nothing, to hold it for him.

The Court of Common Pleas found for the defendant; and, on error prosecuted to the District Court, the judgment was reversed, and the case is now brought here for review on appeal. It has been decided that, in order to institute proceedings under the statute, the petitioner must be in actual possession of the premises; the object of the proceeding being, not for the purpose of settling the title of the premises in the first instance, but only preliminary to an action which the defendant or adverse claimant may be ordered to bring for that purpose. (Von Phul v. Penn, 31 Mo. 333.) The plaintiff, before he can avail himself of the statutory privilege, must show an actual possession — *pedis pos-*



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*sessio*—and the only inquiry is, whether Ullman's entering and retaining the occupancy of the room amounted to such an ouster as to deprive him of this particular remedy. There is no attempt to deny the plaintiff's uninterrupted and exclusive possession for several years; and it is also an unquestionable fact that Williams was the tenant of the plaintiff. His giving the key, then, to the defendant, was a void attornment, and could not affect the possession of his landlord, the plaintiff. Section 15 of Gen. Stat. 1865, p. 740, declares that the attornment of a tenant to a stranger shall be void, and shall not in anywise affect the possession of his landlord, unless it is made with the consent of the landlord, or pursuant to or in consequence of a judgment at law, or a decree in equity, or sale under execution or deed of trust, or to a mortgagee after the mortgage has been forfeited. Such being the case, the plaintiff's possession was not affected, and it was wholly incompetent for the defendant to set up any adverse possession.

The action of the Court of Common Pleas in the giving and refusing of instructions was based on a misapprehension, and the decision of the District Court, in reversing the judgment, must be affirmed. The other judges concur.

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WILLIAM CARPENTER, Respondent, *v.* THOMAS KING *et al.*,  
Appellants.

1. *Justice's Court—Judgment—Transcript—Execution—Construction of Statute.*—The provision of section 6, ch. 90, p. 951, R. C. 1855—section 6, ch. 182, p. 712, Gen. Stat. 1865—which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court after three years had elapsed, without having the same revived, referred exclusively to the issuing of executions by the justice of the peace, and had no application to proceedings on a transcript. The plain import and intention of section 17, ch. 90, p. 961, R. C. 1855—section 14, ch. 183, p. 717, Gen. Stat. 1865—is, that the lien should attach from the time the transcript is filed, for the same length of time and with like effect as upon a judgment, from the date of its rendition.
2. *Sheriff's Deed—Recitals.*—Where the plaintiff is bound to produce a judgment, the recitals in the deed under which he claims should conform to the judgment, in order that the court can see that the deed was made on the judgment.

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3. *Sheriff's Deed—Recitals—What, prima facie Evidence.*—A sheriff's deed which recites the date of the rendition of the judgment, the amount for which it was rendered, the names of the parties to the record, the time of filing the transcript, and the time when execution was issued, is sufficiently definite to render it *prima facie* evidence and shift the burden of proof upon the adverse party, if he denies its validity, even if it does not recite the name of the justice of the peace before whom it was rendered. Such recitals contained every material fact required by the statute relating to executions.
4. *Sheriff's Deed, presumptive evidence of its recitals—Burden of Proof.*—The sheriff's deed is presumptive evidence of the recitals contain in it, without any accompanying proofs; subject, however, to be destroyed or invalidated when attacked by a party resisting it. (*McCormick v. Fitzmorris et al.*, 39 Mo. 24, affirmed.)

### *Appeal from Livingston Circuit Court.*

This case came by appeal through the Fifth District Court.

*Hall & Oliver*, for appellant.

I. It is not necessary that a sheriff's deed should recite the issuing by the justice of an execution, and its return "no property found." (*Coons v. Munday*, 3 Mo. 374; *Murray v. Saxton*, 15 Mo. 623; 13 U. S. Dig. 318, §§ 31, 32.)

II. The judgment in which the Circuit Court execution issued was not dormant at the time of the issue. When a transcript of a justice's judgment is filed in the clerk's office of the Circuit Court, it is to be carried into effect in the same manner as judgments of Circuit Courts, and a judgment of that court is carried into effect by an execution issued at any time within five years from and after its rendition. (R. C. 1855, p. 961, § 17; *id.* p. 904, § 12.) Moreover, the act of 1863 continues the lien of judgments for the period of five years from and after their rendition. (Adj. Sess. Acts 1863, p. 24.)

III. An execution on a dormant judgment is not a nullity. A sale under such a judgment can be attacked only in a direct proceeding, and will be treated as valid in an action of ejectment. (8 Johns. 304; 1 Cowan, 736-7; 16 Johns. 575; 1 Ind. 431; 2 Ind. 252; 2 Serg. & R. 426; 17 *id.* 327; 4 Watts, 473; 4 How. 79; McLean's R. 338; Wright's R. 738; 8 Mo. 264; McNam. Null. 68.)

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*Asper & Pollard*, for respondent.

I. The sheriff's deed did not describe a judgment as rendered in any court known to the laws of this State. (*Crittenden v. Leitensdorfer*, 35 Mo. 239; *Moreau v. Detchemendy*, 18 Mo. 522.)

II. The judgment, at the time the execution was issued, was dormant and dead, and could give no legal vitality to the execution sale and proceedings of the sheriff; and the pretended deed was a nullity, as appeared on its face. It was presumed satisfied. (R. C. 1855, p. 902, §§ 3, 11; *id.* p. 951, § 6; *id.* p. 961, §§ 16, 17; *Lackey v. Lubke*, 36 Mo. 115; *Weston v. Clark*, 37 Mo. 568; 4 Wend. 474; *Turner v. Keller*, 38 Mo. 332; *Lytle v. Cin. Man. Co.*, 4 Ohio, 466.)

III. The execution was on a judgment of the justice. Filing the judgment in the circuit clerk's office does not change the character of the judgment. It must be revived there. In a sale on such a judgment, it must be described as a sale on a justice's judgment. (R. C. 1855, p. 961, §§ 16, 17; *Bennett v. Vinyard*, 34 Mo. 217.) The judgment in this case is general, and regulated by the practice statute exclusively. (*Bunding v. Miller*, 10 Mo. 445; *Blair v. Coppedge*, 16 Mo. 495.)

IV. The writ was no protection, nor could it convey title, because it showed on its face that it was void. (*Lackey v. Lubke*, 36 Mo. 115.)

V. A dormant judgment is, to all intents and purposes, dead. It can give no vitality to executions issued upon it. (*Norton v. Brown*, 5 Ohio, 178; *Hutchinson v. Hutchinson*, 15 Ohio, 301.) It is presumed to have been satisfied. (*Lytle v. Cin. Man. Co.*, 4 Ohio, 466; 2 Swan's Pr. 1003-4.)

WAGNER, Judge, delivered the opinion of the court.

The material question in the present case regards the proper construction to be placed upon the statutes in respect to transcripts issued from the judgments of justices of the peace, and filed in the office of the clerk of the Circuit Court.

The action was ejectment, brought in the Livingston Circuit Court, and the defendant relied for defense on a purchase of the

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premises made at sheriff's sale. The court, at the instance of the plaintiff, excluded the sheriff's deed, together with the execution issued from the clerk's office, and also the judgment and proceedings had before the justice of the peace.

From the record it appears that one Ashford Saxton, on the 26th day of May, 1860, recovered judgment against Carpenter, the plaintiff, before James May, a justice of the peace for Livingston county, for the sum of thirty-three dollars and twenty-five cents debt, and six dollars and seventy-five cents costs; that an execution was regularly issued on the judgment by the justice of the peace, directed to the constable, and by him returned "no property found;" and that afterward, on the 13th day of June, 1862, a transcript of the judgment was filed in the office of the clerk of the Circuit Court, and recorded and entered upon the docket of judgments and decrees; and that on the 10th day of December, 1863, execution issued from the clerk's office, by virtue of which the land was sold by the sheriff, under which sale the defendants claim the title. It is contended by the plaintiff's counsel that, under the provisions of the statute, the execution was issued by the clerk without authority, and in express violation of law, and that the purchaser at the sale took no title in consequence thereof. And this opinion seems to have been adopted by both the Circuit and District Courts. To support this view, section 6, p. 951, R. C. 1855, is cited, which provides, in reference to executions issued on justices' judgments, that neither the plaintiff nor his legal representatives shall, at any time after the expiration of three years from the rendition of a judgment by any justice of the peace, sue out an execution thereon, unless such judgment be revived in the manner directed in subsequent sections of the act. And it is insisted that this prohibition is absolute on all courts, and the filing of a transcript in the Circuit Court can make no difference as to prolonging the time.

By section 16, R. C. 1855, p. 961, provision is made for filing transcripts from justices' courts in the office of the clerk of the Circuit Court, and section 17 declares that every such judgment, from the time of filing the transcript, shall have the same lien on the real estate of the defendant in the county as is given to

judgments of Circuit Courts, and shall be under the control of the court where the transcript is filed; may be revived and carried into effect in the same manner and with like effect as judgments of Circuit Courts, and executions issued thereon may be directed to and executed in any county in the State. Liens on judgments rendered in the Circuit Court, by the statute of 1855, continued for three years from the date of rendition, and the party in whose favor judgment was given might, at any time within five years after the entry of judgment, enforce the same by execution. It is apparent, we think, and such has always been the general opinion of the profession, that the provision of the statute which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court after three years had elapsed, without having the same revived, referred exclusively to the issuing of executions by the justice of the peace, and had no application to a proceeding on a transcript. The question, then, remains to be determined, what shall be the effect and nature of the transcript when filed in the office of the clerk of the Circuit Court? The law, it seems to me, can bear but one construction. The language is, that every judgment of a justice of the peace, from the time of filing the transcript, shall have the same lien on the real estate of the defendant in the county as is given to judgments of the Circuit Court, and shall be under the control of the court where the transcript is filed; may be revived and carried into effect in the same manner and with like effect as judgments of Circuit Courts. It is very obvious that, for many purposes, the transcript, when it is filed, has the same dignity and force as a judgment regularly rendered in the Circuit Court. It has the same lien on the real estate, and is under the control of the court; it must be revived and carried into effect in the same manner and with like effect as judgments originally rendered in the Circuit Court. Suppose the lien expires after the transcript is filed in the clerk's office. If it was desired to renew and preserve it, there could certainly be but one course to pursue, and that would be to issue *scire facias* from the office of the Circuit Court. But the plain import and intention of the statute is clear, and that is that the lien should attach from the time the transcript is



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filed, for the same length of time and with like effect as upon a judgment, from the date of its rendition. Such being our view of the law, the execution was regularly issued. Another objection has been taken, that the recitals in the sheriff's deed are so defective as to be fatal. The deed recites that, on the 26th day of May, A. D. 1860, judgment was rendered in a justice's court of the county of Livingston, in favor of Ashford Saxton, on which a transcript was filed in the office of the clerk of the Circuit Court, on the 13th day of June, 1862, against William Carpenter, for the sum of thirty three dollars and twenty-five cents for debt, and six dollars and seventy-five cents for damages; upon which judgment an execution issued from the clerk's office of said court, in favor of the said Ashford Saxton and against the said William Carpenter, dated the 10th day of December, 1863, directed to the sheriff of the county of Livingston, etc. It is now said that there is no such court as the justice's court known to the law, and that the recital does not conform to the judgment in the case. Undoubtedly, where the plaintiff is bound to produce a judgment, the recital in the deed under which he claims should conform to the judgment, in order that the court may see that the deed was made on the judgment. There is no question made but that the execution correctly recites all the facts. The whole object of the recitals is to avoid questions of variance. Now, the deed does not recite the name of the justice of the peace before whom the judgment was rendered, but it does recite the date of the rendition, the amount for which it was rendered, the names of the parties to the record, the time of filing the transcript, and when execution was issued. This, we are inclined to think, is sufficiently definite to render it *prima facie* evidence and shift the burden of proof on the adverse party, if he denies its validity. The statute concerning executions requires the officer making the sale of any real estate to make to the purchaser a deed, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars as recited in the execution, with a description of the property, the time, place, and manner of sale; which recital should be received as evidence of the facts therein stated. The

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recitals in the present deed contained every material fact required by the statute. In construing this statute, in *McCormick v. Fitzmorris et al.*, 39 Mo. 24, we held that the deed would be presumptive evidence of the recitals contained in it, without any accompanying proofs, subject to be destroyed or invalidated when attacked by a party resisting it. The fact that the execution was issued on a transcript cannot distinguish it, in the operation of the rule, from a case where it was issued on a judgment of the court.

The judgment will be reversed and the cause remanded. The other judges concur.

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JOHN ADAM SCHMIDT, Respondent, *v.* LYMAN DENSMORE,  
Appellant.

Per HOLMES, Judge.

1. *County Bridges—Statute—Common Law Remedies.*—The mode of compensation to owners of lands adjoining county bridges, prescribed by the twenty-first section of the chapter concerning bridges (Gen. Stat. 1865, p. 299), must be held to be exclusive of common law remedies.
2. *County Bridges—Statute, what authority given by.*—The authority to take rock and timber from adjoining private lands, conferred by that section, is broad enough to embrace all the specified cases of building and repairing county bridges.
3. *County Bridges—Commissioner—Contractor—Agency, how given.*—The County Court, the commissioner, and the contractor or undertaker, were all alike the agents of the county, and derived their powers and authority from the provisions of the law. The commissioner could not only take the necessary materials for building the bridge, in person, but he might cause them to be taken by his proper agents. And it was not necessary that the authority should be given by express words in the contract. It resulted from the very nature of the employment.
4. *Trespasses—Act concerning, contemplates what.*—The act concerning trespasses (Gen. Stat. 1865, ch. 76, § 1) contemplates voluntary or willful trespasses only, which are committed without any lawful right, and it inflicts penalties as upon a wrong-doer.
5. *County Bridges—Materials for building, how may be taken under Statute.*—The clause in a contract between a county commissioner and a contractor for building a county bridge, which provides that said contractor was "to furnish all the material required for said bridge," does not exclude the authority conferred by the statute to procure these materials by taking them

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from the adjoining lands, in case they could not be purchased elsewhere. If such an agreement divested him of the powers conferred on him by statute through the County Court and the commissioner, and by virtue of the agency created by the contract itself, it would be in contravention of the law, and would exceed the lawful authority of the commissioner, and would therefore be void.

6. *County—Payment by, for material chargeable to contractor—How construed.* The county being compelled by operation of law to pay money which by the terms of the contract the contractor was bound to pay; as between him and the county it would amount to a payment made at his request and for his use.

Per CURIAM.

1. *Eminent Domain, not given by implication.*—The power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language.
2. *County Bridges—Statute—Construction.*—The twentieth and twenty-first sections of the chapter in relation to bridges (Gen. Stat. 1865) were intended to apply only to cases where the county commissioner either repairs or builds the bridge by the direct employment of some person, when the contractor has failed to comply with his covenants, and have no application to the original contractor; and in that case the county pays for the materials and recovers their value, as well as the price paid for the labor of repairing, from the contractor who is in default.
3. *Damages—Appeal—Practice.*—Where plaintiff, having claimed treble damages, was allowed single damages only, and failed to appeal from the judgment of the court, but the case was carried to the District Court by defendant, it was error to reverse the decision below and award plaintiff treble damages.

*Appeal from Livingston Circuit Court.*

*Dixon & McFerran*, for appellant.

I. It was error for the District Court to reverse the judgment of the Circuit Court on the ground of the smallness of the amount of the judgment, without any appeal on the part of the plaintiff.

II. The appellant's defense was complete, as he acted under the authority of the county road commissioner; and the Circuit Court erred in refusing to instruct the jury to that effect. (Gen. Stat. 1865, p. 299, §§ 20, 21, 22; 36 Mo. 543-6; Pierce on Am. Rail. 168, and authorities therein referred to; 31 Me. 215, 216; 4 Wend. 668; 12 Mass. 466, 364.)

III. The act concerning bridges makes no distinction between

the building of a bridge originally and the replacing of one that has been carried away or destroyed.

IV. The special remedy given by the statute to respondent, for property taken for public use, is exclusive, and bars a civil action or common law remedy for compensation or damages. (*Lindell's Adm'r v. Hann. & St. Jo. R.R.*, 36 Mo. 543.)

*Asper & Pollard*, for respondent.

I. The road commissioner can only take timber, etc., or authorize others to do so, for the county. When the county builds a bridge, or repairs one, or the commissioner does it, then he can take timber, etc., or authorize it to be done. It is then taken for public benefit, and the principle of eminent domain applies.

II. The road commissioner builds or repairs a bridge for a guarantor, when he fails, on due notice; and then his power under sections 20 and 21 applies. (Gen. Stat. 1865, p. 299, §§ 20, 21.)

III. The principle of eminent domain does not apply to the case at bar. Here appellant was building the bridge. It was his property until accepted by the county; a contingency which might never occur. It was taking private property for private use. (Const. Mo. art. 1, § 16; 2 Kent's Com. 339, 340; *Wilkinson v. Deland*, 2 Pet. 657; *Gardner v. Village of Newbury*, 2 Johns. Ch. 162; 11 Wend. 149; 6 Paige, 146; *Norman v. Hurst*, 5 Watts & S. 170; *Soulard v. City of St. Louis*, 36 Mo. 553; 18 Wend. 9, 12; 19 Wend. 658, 674.)

IV. The only thing which will relieve a party from the consequences of his trespass — *i. e.*, from the penalty — is an honest belief that the property is his own. (Gen. Stat. 1865, p. 379, § 4; 12 Mo. 571.)

HOLMES, Judge, delivered the following opinion.

The petition appears to have been framed under an act concerning trespasses (Gen. Stat. 1865, ch. 76). The answer admitted the cutting of the timber as alleged, but justified the act under the provision of the statute concerning bridges (Gen. Stat.

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1865, ch. 53). The evidence on the part of the defendant showed that he was the contractor or undertaker, under the road commissioners of the county of Livingston, by a written contract dated September 6, 1866, for the building of a county bridge over Shoal Creek, in said county, in accordance with specifications to be exhibited by said commissioners, and concluding in these words: "Said L. W. Densmore to furnish all the material required for said bridge, and to receive, as full compensation therefor, the sum of three thousand six hundred dollars, payable in warrants on the county treasurer of said county—one-half of said amount due and payable on the delivery of the material for said bridge, and the remainder on the completion of said bridge, as hereinbefore set forth; and to turn over and surrender to the party of the first part said bridge, when completed, upon the receipt of payment therefor. And the party of the first part agrees to put the party of the second part in possession of the right of way at said crossing, so far as necessary for the purpose of construction, and to pay for said work, as above specified, and to receive from the said party of the second part the said bridge as soon as the same is completed, and certify the fact to the County Court of Livingston county, aforesaid." It further appears that the contractor, on proceeding to the execution of the work, finding, upon diligent inquiry and search, that he could not purchase the requisite timber in the vicinity, procured the commissioner to go with him upon the adjoining lands of the plaintiff, where suitable timber was found, and with his special permission and authority proceeded to cut and carry away from thence the amount of timber trees which were required for the building of the bridge in question; and that this was the trespass complained of.

The court below instructed the jury for the plaintiff, upon the theory that the defendant's evidence did not bring his acts in the premises within the protection of the statute relating to bridges, which provided that the commissioner might take or cause to be taken from the adjoining or most convenient lands such quantities of rock and timber as might be necessary for the building or repairing of such bridge (ch. 53, § 20), but that, having contracted to furnish the materials, he was a trespasser upon the



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lands of another, without any authority of law. Treble damages were refused, on the ground that he supposed that he had a lawful right. On appeal by the defendant to the Fifth District Court, the plaintiff was held to be entitled to treble damages, and the judgment was therefore reversed, and the cause remanded for further proceedings in accordance with that opinion; and from this judgment the defendant appealed to this court.

It is not denied, on the part of the plaintiff, that if the defendant's justification brought his acts within those provisions of the statute concerning bridges which authorize the taking of timber necessary for building bridges, and provide a special remedy for the party aggrieved, the case would fall within the decision in *Lindell's Adm'r v. The Hannibal and St. Joseph Railroad Company*, 36 Mo. 543, and would be determined in defendant's favor by the principles therein enunciated. We have to consider, then, what is the proper construction of this statute in this regard, and whether it can be invoked in aid of this defense. By this act the County Court is to determine what bridges shall be built by the county, and to order the road commissioner to contract for the building of the same, upon an estimate and appropriation previously made. The commissioner is to let the work by contract; he cannot be the undertaker or contractor himself. The expense of building the bridge is to be paid out of the county treasury. The act makes provision, also, for the building of bridges, upon a petition of forty resident householders; for building bridges over water-courses which divide one county from another; for the building of bridges by road districts, and for the repair of any public bridge in the county; and whenever any such public bridge shall be repaired, the like preliminary steps are to be taken as in the case of building a bridge, and the commissioner is to have the same powers and proceed in like manner as a commissioner for building a bridge. No commissioner is to be an undertaker, nor a security for an undertaker, for building the bridge for which he is commissioner. The concluding sections (20-22) relate to the taking from the adjoining or most convenient lands the rock and timber necessary for building or repairing bridges, and they prescribe the mode in which a reasonable com-

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pensation is to be made to the owners therefor. This mode of compensation, on the authority of *Lindell's Adm'r v. Hannibal and St. Joseph Railroad Company*, must be held to be exclusive of the common law remedies in cases to which it has application. The words of the statute are, that "he, the commissioner, may take, or cause to be taken," the necessary timber for the building or repairing of such bridge, and he is to build or repair a public county bridge by contract with some undertaker, and under the order of the County Court.

The several sections of the statute are to be construed together, and each section to be interpreted in view of the general object and intention of the whole act. There is the same necessity for taking private property for public use, in this manner, for the building or repairing of public bridges, in whichever of the cases provided for a county bridge is to be built or repaired. The authority given to take rock and timber on the adjoining private lands is not confined by any words to either case alone, but is broad enough in its terms to embrace all the specified cases of county bridges. The County Court, the commissioner, and the contractor or undertaker, were all alike the agents of the county, and derived their powers and authority from the provisions of the law. The commissioner was subordinate to the County Court, and the contractor was under the directions of the commissioner. They were all bound to pursue the authority given, and to act within the scope of the powers conferred. (*Wolcott v. Lawrence Co.*, 26 Mo. 272.) In this case, the court said, in relation to the powers of the County Court and their subordinate agents in the erection of county buildings under a somewhat similar statute, that the court had no power over the subject but what was given by law; that every person who deals with the court, acting on behalf of the county, is bound to know the law that confers the authority; and that if the special and limited authority conferred by the statute is exceeded in a material matter, the county will not be bound. While they must derive all their power from the law, and keep within the scope of their authority, it is equally clear that they may exercise all the powers which are conferred upon them. When a commissioner is once lawfully appointed, he becomes

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vested with all the powers conferred by the act on such officer acting under the orders of the County Court. When an individual is employed as an undertaker, or becomes a contractor, under the commissioner, for the building or repairing of a public county bridge, he is thereby constituted the agent for the county for that purpose, and he will derive his powers from the law under his contract. There can be no question but that the commissioner had power to take this private property for the public use in this manner, or to cause it to be taken in any proper case. He had been ordered by the County Court to contract for the building of the bridge. By the contract the defendant had undertaken to build it, under the provision of the law, and in accordance with the terms of his contract. It was by virtue of this employment and the agency created under it that he was authorized to take possession of the site on which the bridge was to be erected, to employ men for the work, to procure the requisite material for construction, and to complete the bridge. There can be no doubt that he had full power to build this bridge, and for that purpose it must be implied that he might exercise all the powers which were conferred upon him as such agent by the statute, or by the commissioner acting under the statute, in the execution of his agency under the contract. The commissioner could not only take the necessary materials in person, but he might cause them to be taken by his proper agents. What he did by his authorized agent, he did himself—*qui facit per alium, facit per se*. It was not necessary that the authority either to take possession of the site, or to enter and cut the requisite timber upon private lands adjacent, should be given by express words in the contract. It resulted from the very nature of the employment. This being correct, it was wholly unnecessary that he should call upon the commissioner to make the entry in person, and assume the immediate direction of the proceedings himself. But, whatever doubt there might be upon this point, it is perfectly clear, upon the evidence admitted, that the commissioner did in fact go upon the land himself with the defendant, and directly authorize him to cut and carry away the requisite timber. The thing done was the act of the commissioner in person; the defendant was simply his

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hand and instrument, and there is no ground left for charging him as a willful trespasser or a wrong-doer, as if he had been acting upon his individual responsibility and without any authority of law. The act concerning trespasses contemplates voluntary or willful trespasses only, which are committed without any lawful right, and it inflicts penalties as upon a wrong-doer. (Lindell's Adm'r v. Hannibal & St. Jo. R.R. Co., 36 Mo. 545.) It necessarily follows that the defendant had shown a complete defense to the action, and the jury should have been instructed accordingly.

It was insisted, on behalf of the plaintiff, that as the defendant had undertaken, by his contract, "to furnish all the materials required for said bridge," he was bound thereby to procure the requisite materials by purchase at private sale, at whatever cost or inconvenience to himself, and without invoking the statute power of taking the same from the adjoining lands of private owners. We do not so interpret the contract. He was "to furnish all the materials required for said bridge, and to receive as full compensation therefor the sum of three thousand six hundred dollars, payable in warrants on the county treasury," in the manner specified. It would seem to have been the object of this clause to fix the amount of compensation which he was to receive for the whole work completed, and to prescribe the manner in which he was to be paid. The proper effect of this clause is, we think, that he is to procure the materials at his own expense, and not at the cost of the county, over and above the fixed compensation. It does not exclude the authority conferred by the statute to procure these materials by taking them from the adjoining lands in case they could not be purchased otherwise. Even if it could be properly construed to bind him in terms to procure the materials by contract of sale, it would by no means follow that he would be thereby divested of the powers conferred on him by the statute through the County Court and the commissioner, and by virtue of the agency created by the contract itself. Otherwise, such an agreement would be in contravention of the law, and would exceed the lawful authority of the commissioner. If so made, it would therefore be void. The provision in question is

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made for the benefit of the county, and in order that public bridges may be built at a reasonable and moderate expense.

It is further objected for the plaintiff that as the private owner is to receive his compensation out of the county treasury, in the mode pointed out by the statute, this expense would fall on the county and not on the contractor. We do not think that such would be the consequence. It is true that the private owner would receive his compensation from the county treasury, but under the terms of the contract the amount so paid by the county would be included in the fixed compensation or price which the contractor was to receive in full satisfaction for the whole work, materials included. The contract expressly stipulates that one-half of this price is to be "due and payable on the delivery of the material for said bridge, and the remainder on the completion of said bridge." The commissioner certainly had knowledge of the manner in which the materials here in question had been obtained, and the County Court was bound to take notice of the law which provided that they might be taken from the lands of private owners in that manner. The county authorities had, therefore, the means of notice, if not actual notice, that this claim might come against the county treasury, and they could have withheld and deducted it from the amount due the contractor, as effectually as if the contractor had agreed with the owner upon the price of timber, and drawn a warrant in his favor on the county treasury for the amount. The amount of this claim, when it had been paid by the county, would have been a valid set-off in any suit by the contractor for his stipulated price; or if, by any chance or mistake of fact, that price had been previously paid to him in full (an event which could scarcely happen, with anything like a proper attention to the business), we do not see but that the amount could be recovered back from him by the county, in an action for money had and received, or for money paid to his use and at his instance and request. The county being compelled by operation of law to pay money which by the terms of the contract the contractor was bound to pay, as between him and the county it would amount to a payment made at his request and for his use.



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I am of the opinion, therefore, that the judgments both of the Circuit and the District Courts should be reversed, and the cause remanded to the Circuit Court for a new trial in accordance with this opinion.

WAGNER, Judge, delivered the opinion of the court.

As I cannot concur in the construction which has been placed on the statute concerning the erection of bridges by my brother Holmes, it will be necessary to state briefly the opinion which I entertain. His elaborate and ingenious argument to show that the contractor has, by implication, power conferred on him by law to enter on private property, and cut and take away timber and other materials, is almost of itself sufficient to negative any such authority; for if any grant to that effect existed, it ought to be in terms so plain as not to require a labored resort to inferences and implications.

The legislature, it is admitted, has the power to authorize the taking of private property for public use, by virtue of the right of eminent domain, upon just compensation being made therefor. But the power at best is in derogation of property and the right of the citizen, and is not to be extended beyond the plain provisions of the law. If it is intended to take or convert property without the consent of the owner, the authority must not be implied or inferred. It must be given in express terms, and written in plain English. Certainly there is no positive or express power, anywhere in the statute, given to the original contractor for the erection of a bridge, to invade the premises of the citizen and take his property at his own will and pleasure, without the consent or permission of the owner. Such a power can only be deduced by resorting to a strained and artificial construction. The contract entered into by the defendant was for building a public bridge, and he bound himself to furnish all the materials. He then stood on the same footing as any other man undertaking to do or perform a certain work, and was to furnish his own materials as best he could.

By section 4 of the chapter in relation to bridges, it is provided that the County Court shall determine in what manner and

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of what materials the bridge shall be built, and shall order the road commissioner to contract for building the bridge, and for keeping the same in repair not less than two nor more than four years, to be determined by the court. The tenth section of the same act prescribes that the county commissioner shall let the same, by public outcry, to the person making the lowest bid, and shall take bond, payable to the county, with two good and sufficient householders as securities, in such penalty as he shall deem sufficient to cover all damage which may accrue from the breach of such contract. The bond is given to secure the building of the bridge according to the plan and specifications, and the builder is further liable for the continuance of the bridge not less than two nor more than four years, as the court shall see fit to determine.

Now, by section 16, it is provided that the County Court shall, whenever it is necessary, without delay, make an appropriation to repair any public bridge within the county; and whenever any bridge shall be repaired, the like preliminary steps shall be had as in case of building a bridge, and the commissioner shall have the same powers and proceed in like manner as the commissioner for building a bridge. This section applies in the case of a bridge where the repairs are to be made by the county, and then the commissioner proceeds to let out the contract for making the repairs in the same manner as in an original letting to build.

But the next succeeding section (17) declares that if any public bridge require repairing, which by contract is required to be kept in repair, the commissioner shall give notice in writing to any one or more of the undertakers, or to his or their securities, stating the repairs necessary to be made, and requiring the same to be done within a reasonable time. Then, if the repairs are not made within the time required, the commissioner shall employ some other person forthwith to make the same, allowing therefor a reasonable price, and may immediately collect the amount paid, with costs, before any court of competent jurisdiction. When that is done, the commissioner may take or cause to be taken, from the adjoining or most convenient lands, such quantity of rock and timber as may be necessary for the building or repairing of such bridge. (§§ 18-20.)

It will be thus seen that in no case is provision made or authority given to the commissioner to enter upon land and take timber or other material, except where he either repairs or builds the bridge by the direct employment of some person, when the contractor has failed to comply with his covenants; and in that event the county pays for the materials and recovers their value, as well as the price paid for the labor of repairing, from the contractor who is in default. The manner and mode of agreeing upon the value of the material so taken is provided for in section 22, as also how the compensation is to be made. But I can imagine no reasonable rule of construction by which this provision can be made applicable to the person first taking the contract of building. The commissioner is nowhere authorized to enter upon the lands of a private citizen for the purpose of taking rock or timber for the building of a bridge in the first place; much less is he authorized to delegate such authority to a third person. There is no mode pointed out by which the county can be indemnified for the amount so paid as compensation, only in the instance where repairs are made, or the bridge is built, and recourse is still preserved against the contractors. This is the only provision made in regard to the subject, and it is fair to presume that it was only such a case that was intended to be provided for. *Expressio unius est exclusio alterius.*

Any other construction would be unreasonable. The county pays the person taking the contract when he completes the bridge. The person whose materials have been taken is not obliged promptly and at once to claim his compensation or damages. Suppose the claim is not made till after the money is paid for the erection of the bridge, and in the meantime the builder has absconded or become insolvent. The theory then would be that the county must pay, but it would have no recourse. In other words, after once paying for the materials to the contractor, it would be obliged to again pay for them to the person from whom they were taken. The law has not said any such thing, and I can see no warrant for giving it such a construction.

The court below found single damages for the plaintiff. He then moved that they might be trebled, but the court denied the

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motion, and he did not appeal. The defendant took the cause to the District Court, where the judgment was reversed and treble damages awarded. This was error. Although the plaintiff might have been entitled to the damages given him by the District Court, he did not appeal. He was not complaining, and had assigned no errors. He was therefore not entitled to a reversal in his behalf.

I think the judgment of the District Court should be reversed, and that of the Circuit Court affirmed; and, Judge Fagg agreeing with me, it will be so ordered.

[ END OF FEBRUARY TERM. ]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
MARCH TERM, 1868, AT ST. LOUIS.

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STATE OF MISSOURI, Respondent, *v.* THOMAS W. HUNTER,  
Appellant.

1. *Practice, Criminal—Appeals—Neglect to file statements, etc., how treated.*—  
In appeals from the Criminal Court, where no statement or briefs are filed,  
the case will be dismissed. In these cases the Supreme Court is governed by  
the practice in civil cases, and not by the act concerning criminal practice.

*Appeal from St. Louis Criminal Court.*

*C. P. Johnson*, Circuit Attorney, and *Huffman & Brown*,  
for respondent.

*Marshall & Withers*, for appellant.

HOLMES, Judge, delivered the opinion of the court.

This is an appeal from the St. Louis Criminal Court, in a suit commenced before a justice of the peace for an assault and battery. There are no statements or briefs, as required by statute. In these cases we are governed here by the practice in civil cases, and not by the act concerning criminal practice. (*State v. Warne*, 27 Mo. 418; 18 Mo. 318; 38 Mo. 295; 39 Mo. 419; 40 Mo. 603.)

The appeal will therefore be dismissed. The other judges concur.



## STATE OF MISSOURI, Respondent, v. LOUISA DAUBERT, Appellant.

1. *Criminal Law—Conspiracy—Evidence—Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the act of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.
2. *Criminal Law—Conspiracy—Evidence—Order of introduction of testimony.*—Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.

*Appeal from St. Louis Criminal Court*

*Hudgins, Woerner & Kehr*, for appellant.

*C. P. Johnson*, Circuit Attorney, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was jointly indicted with one Johanna Williken, for the crime of larceny, in taking certain articles of merchandise from the store of one Charles H. Moeller, in the city of St. Louis. Upon the trial, the defendant demanded a severance, and elected to be tried separately. She was convicted of petit larceny, and the jury assessed her punishment at a fine of fifty dollars and three months' imprisonment in the county jail. The errors complained of, and on which reliance is placed for the reversal of the judgment, are the admission of illegal evidence against the objection of the prisoner, and the misdirection of the jury.

The facts are few and simple, and are mainly these: The defendant and Mrs. Williken went to the store of the prosecutor, ostensibly for the purpose of purchasing goods. While examining various articles, the suspicions of the prosecutor became aroused concerning certain movements of Mrs. Williken. The defendant

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bought whatever goods she wanted; had the bill made out; received and paid for them. Both women were then detained by those in charge of the store, and an attempt was made to search them. Mrs. Williken permitted the search to be made; the defendant resisted. Upon the person of Mrs. Williken several articles were found, alleged to have been stolen, and she finally admitted the fact, and promised not to steal any more, if they would let her go. A policeman was then called, who arrested the women and took them to the police station. The defendant was then searched, but nothing was found on her person, or in her possession, except the articles she had purchased and paid for. Some articles, claimed to have been stolen from the prosecutor, the next morning were found in an alley, but there is no evidence in anywise tending to prove that the defendant was ever out of the store previous to her being arrested and taken to the police station, or that she was in a situation to have any connection with their being placed there. Other evidence was introduced against the objections of the defendant, showing that the two women had visited other stores together; but there was nothing to show any common design between them, or that they had committed any improprieties. The counsel for the prisoner objected to all the evidence relating to the acts, declarations, and admissions of Mrs. Williken, but the court overruled the objection and permitted the testimony to go to the jury.

If the testimony was illegally admitted, the verdict cannot be allowed to stand; for, outside of the acts and confessions of Mrs. Williken, there is no evidence on which to base a conviction against the accused. For aught that appears, she demeaned herself as any honest person would have done in the transaction of her business, making her purchases and paying for them. Nor were any suspicious circumstances thrown around her conduct, or the fruits of guilt found in her possession. The conviction can only be supported by establishing some combination, complicity, or privity between the parties, for the purpose of carrying out some common design. Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one con-

spirator in the prosecution of the enterprise are considered the act of all, and are evidence against all. (State v. Ross, 29 Mo. 32.) Each is deemed to assent to or commend what is done by any other in furtherance of the common object. (1 Greenl. Ev. § 233.) "The principle," says Greenleaf, "on which the acts and declarations of other conspirators, and acts done at different times, are admissible in evidence against the person prosecuted, is, that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestæ*, and therefore the act of all." (3 Greenl. Ev. § 94.)

But this evidence is not limited to cases of conspiracy. It is a general rule, applicable in a variety of cases, in all the departments of the law, civil and criminal.

The confessions of one defendant cannot, in the first instance, establish the conspiracy against another defendant; for the conspiracy must be shown before the confession of one can be received against another. It is so, also, of other acts and declarations. But when the combination is shown, then the evidence of what is said and done by one is admissible against the rest. And it is for the court to determine when the evidence of combination is sufficient for this purpose. (2 Bish. Crim. Pro. § 190, and cases cited.)

The order in which the evidence should be admitted is in a large manner to be determined by the discretion of the judge. And other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.

In the case at bar there was hardly a scintilla of evidence showing any understanding or combination between the defendant and Mrs. Williken to commit the crime alleged in the indictment, or that they went to the prosecutor's store in furtherance of a common object. The evidence, therefore, of the acts and declara-

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tions of Mrs. W. were wholly illegal, as against the defendant, and should have been excluded. Strike out this evidence, and there is nothing left to support and uphold the verdict, and the court should have so declared.

The judgment will be reversed and the case remanded. The other judges concur.

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 STATE OF MISSOURI, Respondent, v. HENRY DAUBERT, Appellant.

1. *Practice, Criminal—Indictment—Motion compelling to elect.*—The practice is now well settled that a motion to compel the prosecuting attorney to elect upon which count of an indictment he will proceed, is addressed to the sound discretion of the court trying the case, and the Supreme Court will not interfere with that discretion unless it is apparent that it has been exercised oppressively or to the manifest injury of the accused. Where the offense charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and whenever there is a legal joinder, the court may exercise its discretion as to an election.
2. *Practice, Criminal—Indictment—Nolle Prosequi.*—Where two defendants were jointly charged, in the same indictment, on two counts: 1, for larceny, and 2, for receiving stolen goods, it was error to permit the circuit attorney to enter a *nolle prosequi* against one defendant upon the first count, and against the other upon the second. The two remaining counts really constituted two indictments, requiring different kinds of proof, and separate and independent verdicts.
3. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible.*—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.
4. *Practice, Criminal—Evidence—Verdict.*—If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.

*Appeal from St. Louis Criminal Court.*

*Hudgens, and Woerner & Kehr, for appellant.*

I. The court erred in not compelling the circuit attorney to elect between the two counts in the indictment. The power is within the discretion of the court. (1 Chit. Cr. L. 248-9; 1 Arch.

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Cr. Pl. 93-1.) The Supreme Court will not reverse a cause for the exercise of such discretion, "unless in a case where the abuse is most obvious and manifest." (State v. Jackson, 17 Mo. 546.) It was manifest error in the court to permit the introduction of evidence to prove larceny, by proving distinct acts comprehended in other indictments pending at the same time, under color of proving, under the second count, defendant's knowledge that the goods received were stolen goods.

II. The introduction of testimony concerning other alleged felonies was erroneous. The rule that, upon an indictment for receiving stolen goods, evidence may be given of different receipts of goods stolen from the same person, in order to show guilty knowledge, does not comprehend evidence of different acts of stealing (1 Mood. 149; 1 Arch. Cr. Pl. 477, *n.* 2); more especially if such acts of stealing form the subject of distinct indictments. (State v. Wolff, 15 Mo. 169; State v. Goetz & Martin, 34 Mo. 85; Rex v. Smith, 2 Car. & Payne, 683; Rex v. Oddy, 6 Brit. Cr. Cas. 266; Barton v. The State, 18 Ohio, 223; Walker v. The Commonwealth, 1 Leigh, 574.)

III. The court erred in refusing to instruct the jury for defendant that they ought to acquit. The testimony, if all true, does not prove the commission of larceny as charged in the indictment, nor of receiving stolen property, knowing it to be stolen. (3 Greenl. on Ev. § 161; State v. Smith, 37 Mo. 68; 19 Me. 225; 39 Mo. 426, 535.)

*C. P. Johnson*, Circuit Attorney, for respondent.

I. After the election of count in the indictment, by the circuit attorney, there was no misjoinder of offenses. (1 Arch Cr. Pl. 93-1; 1 Chit. Cr. L. 248-9; Whart. Cr. L. 203.) Whether the prosecutor shall elect is a matter left to the discretion of the court, and the Supreme Court will not reverse for a mistaken exercise of this power, unless in a case where the abuse is most obvious and manifest. (State v. Jackson 17 Mo. 546.) The court should compel the prosecutor to elect only when it is apparent that the charges are actually distinct and may confound the prisoner or distract the attention of the jury. (1 Chit. Cr. L.



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248-9; 1 Arch. Cr. Pl. 93-1; Whart. Cr. L. 667; State v. Smith, 37 Mo. 59; State v. Jennings, 18 Mo. 435.)

II. On an indictment for receiving stolen goods, knowing the same to have been stolen, in order to show a guilty knowledge, other instances of receiving such goods may be proved, even though they be the subject of other indictments, antecedent to the receiving in question. (Whart. Cr. L. 677; 2 Brit. Cr. Cas.; Rex v. Dunn, 1 Mood. 146; Rex v. Smith, 2 Car. & Payne, 638; State v. Goetz, 34 Mo. 85; 2 Russell, 215; Haskens v. People, 16 N. Y. 344.)

WAGNER, Judge, delivered the opinion of the court.

Henry Daubert and Louisa Daubert were arraigned on an indictment in the St. Louis Criminal Court. The indictment contained two counts. The first count charged the defendants jointly with larceny, in taking and carrying away certain goods, the property of one Charles E. Barney. The second count charged the defendants with receiving the same goods, knowing them to be stolen. When the case was called for trial, the counsel for the defendants moved the court to compel the attorney prosecuting for the State to elect on which count he would proceed. This motion was by the court overruled, and the defendants excepted. The practice is now well settled that a motion to compel an election is addressed to the sound discretion of the court trying the case, and this court will not interfere with that discretion unless it is apparent that it has been exercised oppressively or to the manifest injury of the accused. (State v. Jackson, 17 Mo. 544; State v. Leonard, 22 Mo. 449; State v. Gray, 37 Mo. 463.) Where the offense charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and whenever there is a legal joinder, the court may exercise its discretion as to an election. There is no such obvious injustice exhibited in the present case as to enable us to say that there was an abuse of a sound discretion. The defendants were jointly put upon their trial, and, after all the testimony was delivered to the jury, the prosecuting attorney entered a *nolle prosequi* as to Henry Daubert on the first count,

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and as to Louisa Daubert on the second count. The counsel for the defendants then moved to quash the indictment, but the motion was overruled.

The cause was then submitted to the jury, and they failed to agree on a verdict in the case of Louisa Daubert, but found Henry guilty, and assessed his punishment at two years' imprisonment in the penitentiary. After the usual motions for a new trial and in arrest of judgment being made and decided adversely to the defendant, the case comes here for revision. The proceeding is anomalous, and no precedent has been found supporting the action of the Criminal Court.

As a general rule, where the offenses are several, distinct, and independent, there can be no joinder. The action of the circuit attorney, in entering of record a *nolle prosequi* against Louisa on the second count, and Henry on the first count, changed the whole scope, tenor, and meaning of the indictment. It then, in effect, amounted to an indictment charging two several offenses against distinct defendants, who had no necessary connection with each other.

The count against Louisa, for larceny, was a substantive charge; the count against Henry, for receiving stolen goods, was another distinct charge or offense. It may, with entire propriety, be said that they really constituted two indictments, requiring different kinds of proof and separate and independent verdicts. Such a course of procedure, besides being wrong in itself, is calculated to confuse the minds of the jurors, divert their attention from one issue to another, and prevent the observance of those rules which the law has assiduously built up for the protection of the innocent. A striking illustration of the dangerous character of the manner in which the proceeding was conducted is manifested in the present case, where the jury failed to agree as to whether the goods were stolen, and yet they bring in a verdict of guilty against Henry Daubert for receiving the very identical goods, knowing them to be stolen. The multiplying of issues and the joinder of defendants in criminal cases met the decided disapprobation of this court in a case less strong than the one at bar.

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In *The State v. Devlin*, 25 Mo. 175, the defendant was put upon his trial for an alleged misdemeanor; and after the testimony was closed, the court refused to submit the case to the jury, as requested by the defendant, and against his objection called the next case on the docket, being also a case of misdemeanor, and impaneled the same jury, heard the evidence in the latter case, and submitted both causes to the same jury at the same time. It was held in this court that error was committed, and the judgment was reversed. It is true that there were separate indictments in Devlin's case, as there should have been in this, after the action of the circuit attorney at the close of the evidence, or at least he should have abandoned one count wholly. We think the indictment should have been quashed, or that motion in arrest of judgment should have been sustained.

As this case will be remanded for another trial, or further proceedings, we deem it only necessary to glance at one or two remaining points. The court erred palpably in admitting testimony of different acts of larceny, when they were entirely disconnected with the offense charged in the indictment and had no real tendency to prove the same. Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. (*State v. Goetz*, 34 Mo. 85.) But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense. (*State v. Harrold*, 38 Mo. 496.)

To admit the evidence, there must be a connection or blending which renders it necessary that the whole matter should be disclosed, in order to show its bearing on the issue before the court. The error in admitting the evidence was not cured by the instruction of the court in withdrawing and excluding it from the consideration of the jury. They had heard it detailed; it had poisoned their minds, and its effects could not be erased from their memories. This rule is so well established, and the matter has been so repeatedly decided by this court, that it is surprising that the courts below will still persist in the practice. As to the sufficiency of the evidence, which has been discussed at length,

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there is no controversy about the law that before a person can be convicted of crime the evidence should be clear that a crime has actually been committed; and if there is no evidence tending to prove its commission, or it is plainly insufficient to justify a verdict, it is the duty of the court to so declare. We have found no other errors in the record requiring special comment at the present time.

Let the judgment be reversed and the cause remanded. The other judges concur.

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LOUIS VASQUEZ *et al.*, Respondents, v. WILLIAM L. EWING,  
Appellant.

1. *Act of Congress of 1812—Commons Title—Recorder Hunt's Certified list—Proof of inhabitation, cultivation, etc., prior to 1803.*—A commons title, under act of Congress of June 13, 1812, with an approved survey, is equivalent to a patent, and must prevail, unless the claimant can prove the facts necessary to show that no title passed; and this may be done by actual proof that claimant had inhabited, cultivated, or possessed a lot, within the meaning of that act, prior to December 20, 1803, situated within the boundaries of the survey of the commons. But documentary evidence, consisting of Recorder Hunt's certified list of lots, confirmed under the acts of June 13, 1812, and May 26, 1824, a U. S. survey and field notes showing the lot sued for, and a certificate of confirmation issued by the United States Recorder of Land Titles, taken alone, are only *prima facie* evidence of title, and not sufficient to surmount the commons title under the act of 1812. (Vasquez v. Ewing, 24 Mo. 31, affirmed.) And it is not enough merely to prove inhabitation, cultivation, or possession, somewhere on the land claimed. There must also be evidence of the location and boundaries of the lot.
2. *Out-lot—Existence of facts necessary to constitute, how determined.*—The existence of facts necessary to constitute an "out-lot" is a question of law for the court.
3. *Out-lot—Location and Boundaries prior to 1803.*—To constitute such a lot, it must be shown to have had an existence as such under the former government, prior to the 20th of December, 1803, with a definite location and boundaries.
4. *Out-lot—Surveyor-General—Power of, to assign location to.*—The Surveyor-General had no authority by law to assign a location to such out-lots, but authority only to survey them by their definite location and boundaries, as they had actually existed prior to 1803, or as the same had been proved before the recorder; nor had his superior officers of the land office any authority by law to create, by instructions, a definite location and boundaries for such lots, where none existed before.

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5. *Out-lot—How shown by evidence of facts in pais.*—When an out-lot is to be proved by evidence of facts *in pais*, it must be shown to have existed in the character of an out-lot prior to December 20, 1803, with designated and ascertainable location and boundaries; though actual occupancy or cultivation may not be essential to establish its existence.
6. *Concession under Spanish Government—Abandonment—Re-annexation.*—Where, under the former government, a written concession, by the lieutenant governor, of certain land was given, upon a condition set forth in the concession, and on the margin of the record of the same was a subsequent entry declaring that the lot remained incorporated in the royal domain on account of the owner having abandoned it, such entry must be competent to show that the practice of abandonment and re-annexation prevailed at that time, and, *a fortiori*, it must be competent to show a re-annexation of the very land conceded.

*Appeal from St. Louis Circuit Court.*

This is an action of ejectment, brought by plaintiffs against defendant in the St. Louis Land Court, in 1857, to recover possession of a certain parcel of land in St. Louis county, fully described in the plaintiffs' petition, containing thirty-two arpents, and designated as U. S. survey 2965. On the trial, plaintiffs offered in evidence: 1. A certified copy of an extract from the list of lots furnished by Recorder Hunt to the office of the Surveyor-General of Illinois and Missouri, as those the titles to which had been proven up before him under the provisions of an act of Congress of May 26, 1824, by which extract it was shown that the land in controversy was certified as confirmed to the legal representatives of Benito Vasquez under acts of Congress of 1812 and 1824. 2. A certified copy of U. S. survey No. 2965, which was a survey for the legal representatives of Benito Vasquez of a tract of land of four by eight arpents, and embraces the land in controversy; and also a certified copy of the field notes accompanying said survey No. 2965. 3. Certificate No. 78, issued by U. S. Recorder of Land Titles for same land. 4. De Ward's map of St. Louis commons, and conflicting private claims therein, and showing the private claim of Vasquez for thirty-two arpents. 5. Testimony showing that some part of the land sued for, near Benito Springs, was cultivated and possessed, both prior and subsequent to December 20, 1803, by Benito Vasquez or his servants; that there was a house on the land, and a fence inclos-



ing a cultivated field thereon, and that there were some fruit-trees on the tract.

Defendant's testimony showed: 1. The claim of the inhabitants of the village of St. Louis to the commons of St. Louis, in 1806, embracing the land in controversy; also, the act of Congress of June 13, 1812, confirming claims to lots, commons, etc. 2. U. S. survey No. 3125 of said commons. 3. The deed of the city of St. Louis to William Carr Lane,\* dated May 27, 1836, conveying in fee all the land in controversy in this suit. 4. Deed of Louis Vasquez, in 1825, conveying to Wm. Carr Lane all his interest in the land in controversy. 5. Deed of Jacques Martin and Eulalie Martin (daughter of Benito Vasquez), dated March 13, 1834, conveying to said Lane all their interest in said land. 6. Deed of other heirs of Vasquez, dated September 3, 1847, releasing to Francis A. Quinette their interest in survey 2965. 7. Deed of Francis A. Quinette and wife to Wm. L. Ewing, the defendant, dated January 10, 1850, conveying to him their interest in said land. 8. The will of Julie Papin Vasquez, widow of Benito Vasquez, dated April, 1825, making Eulalie Martin sole heir of all her immovable property. 9. A concession by Gov. Cruzat, dated January 6, 1784, of four by eight arpents, to Benito Vasquez, "at the locality called The Three Springs, on condition to improve the same in one year from the date hereof; and on the contrary, the land to revert to the royal domain; it remaining subject to the public and other charges which His Majesty may be pleased to impose thereon in future." On the margin of the record (in *Livre Terrein*) of this concession is the following entry: "These four arpents remain incorporated to the royal domain, on account of Benito Vasquez having abandoned them."

The following instruction, referred to in the opinion of the court, was given for plaintiffs:

1. The jury are instructed that if the tract of land of four by eight arpents, in dispute, was a tract or parcel of land which was actually possessed, inhabited, or cultivated by Benito Vasquez

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\* Ewing held Lane's title by virtue of purchase at sheriff's sale.

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prior to the 20th December, 1803, as his individual property, and his claim thereto was not abandoned prior to 13th June, 1812, and that said Vasquez was an inhabitant of the town of St. Louis, and said parcel of land was an out-lot in or adjoining the town of St. Louis, then the title thereto was, on the 13th of June, 1812, vested in said Vasquez or his legal representatives by act of Congress of 13th June; and no survey made subsequently thereto by the United States, embracing said lands as a part of the land granted by said act of Congress as commons to the inhabitants of the town of St. Louis, can impair or interfere with the title so granted to Vasquez.

*S. T. Glover*, for appellant.

I. The claim to the commons of St. Louis by the inhabitants thereof goes back to 1764, at least twenty years prior to the conditional concession made by Cruzat to Benito Vasquez. In February, 1806, the metes and bounds of their claim were fixed by a survey duly returned and recorded in the office of the United States Surveyor-General, also in the recorder's office of St. Louis county. In 1784 a conditional grant was made to Vasquez at "Three Springs," without any metes or bounds. It might have been laid down in ten thousand ways and done no violence to the terms of the concession. Such a concession, so long as the whole land round about the "Three Springs" remained vacant, would be binding on the equity of the government, and it would make no difference how the government might locate it on its own domain. But as against the definite survey of the commons in 1806, laying down the lines and fixing the corners of that tract, the concession to Vasquez was void. In the nature of things it could not be otherwise. When the terms of the grant did not define any particular lands, but referred to a general locality only, the Supreme Court of the United States held that no lands were granted. (*United States v. Delespine*, 15 Peters, 334; *United States v. Lawson*, 5 How. 289; *Buyck v. United States*, 15 Peters, 223; *Watts v. Lindsay's Heirs*, 7 Wheat. 158; *Littlepage v. Fowler*, 11 Wheat. 215; *Menard v. Massey*, 8 How. 295.)

The act of June 13, 1812, § 1, 2 U. S. Stat. 748-9, enacted

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that "the right, title, and claims to town or village lots, out-lots, common field lots, and commons, in, adjoining, and belonging to the several towns of \* \* \* St. Louis, \* \* \* in territory of Missouri, \* \* \* which lots have been inhabited, cultivated, or possessed prior to 20th December, 1803, shall be and are hereby confirmed to the inhabitants of the respective towns or villages, according to their several right or rights in common thereto." If the claim of Vasquez had no definite bounds, and might, at the date of this act, have been laid off in many ways—if it was too vaguely described to be located by one class of boundaries more than another, it was not confirmed; or, if confirmed, the confirmation was so vague as to be null. Such, we think, was the fact. The grant of 1784 was no more certain as to bounds than the proof of witnesses. But, in 1806, the city got her claim surveyed and filed it with the Board of Commissioners. On this claim the act of June 13, 1812, could act, and by force of the certainty of this claim the act did vest a present title, in 1812, to the specific land in the survey of the commons, in the inhabitants of the village. (Page v. Schiebel, 11 Mo. 167.) The act of 1812 conferred title *proprio vigore* on those who had lots with definite metes and bounds. The claimant must bring himself within the act. (Gurno v. Jones, 6 Mo. 336.) Now, we contend that all the time from 1784 to 1852, when survey 2965 made of the claim of Vasquez was approved, no title to the land in that survey had attached. Where the claim has no certain limits, and the judgment of the confirmation carries with it the condition that it shall be surveyed, the title attaches to no land. (Stanford v. Taylor, 18 How. 412.) Where there are no metes and bounds, and no order to survey, and no proofs of metes and bounds orally under act of 1812, the confirmation cannot attach to the land till surveyed; when it does so attach, the conclusion is inevitable that the title is junior to an older survey, and, if in the meantime the land has been surveyed for another, the latter has the best title.

It is said Vasquez's survey is *prima facie* evidence of the correctness of his location. But the survey of the commons is also *prima facie* evidence that the village title covers the land.

And the survey of the commons is prior in time, and therefore superior; and the defendant's title, resting on a *prima facie* location as good at least as that of Vasquez, was superior—*potior conditio defendentis*. This is supposing that the claim of Vasquez to this land was confirmed in 1812. But unless the metes and bounds existed then, it was not confirmed to any particular land. (Magill v. Somers, 15 Mo. 87; Aubuchon v. Ames, 27 Mo. 94.) It is conceded that the title of Vasquez, once made certain by being fixed on some specific land, would, as between the United States and Vasquez, relate back to 1812, but not to overreach the city title which had taken effect prior to the approval of Vasquez's survey. (Alexander et al. v. Merry, 9 Mo. 529.)

II. In the first instruction given for the plaintiff, the court misconceived the statute of June 13, 1812, in what was said to the jury about the operation of said act in respect to an out-lot. The court predicated the confirmation on possession, inhabitation, or cultivation of said parcel of land, if the same was "an out-lot in or adjoining the town of St. Louis." With such an instruction, any lot of ground whatever, inside the town or adjoining it, might be confirmed by the act of 1812. But the words of the act are these, "in, adjoining, and belonging to, the several towns or villages." (2 U. S. Stat. 749.) The lot may be in or adjoining the village, but unless it belongs to the village it is not confirmed. (Page v. Schiebel, 11 Mo. 182; Harrison v. Page, 16 Mo. 205; City v. Toney, 21 Mo. 251.) Up to this last case, whether a parcel of ground was an out-lot, in the meaning of the act of 1812, was deemed a question of law. The case was modified in the case of The City v. Toney, and the court said that, subject to the control of granting a new trial, it was mainly a question for the jury—*mainly*, not entirely. But the court referred the question wholly to the jury, in this case, and took away from it the duty of finding that the lot belonged to the village. We understood the word "belonging," in the act of 1812, to mean subject to the civil regulations of the village in respect to cultivation, fencing, taxing, etc., in the same manner as in common field lots. There was no proof of any such connection with the town.

S. S. Simmons, and F. A. Dick, for respondent.

I. The title shown by the plaintiffs on the trial was a confirmation under the act of Congress of the 13th of June, 1812, founded upon inhabitation and cultivation of the lot in question, as an out-lot, prior to the 20th of December, 1803, by their ancestor, Benito Vasquez, upon which, as a matter of law, they were entitled to recover. (City of St. Louis v. Toney, 21 Mo. 251; Vasquez v. Ewing, 24 Mo. 31; Gamache *et al.* v. Pequignot *et al.*, 17 Mo. 322; Gamache *et al.* v. Pequignot *et al.*, 16 How. 451; McGill v. Somers, 15 Mo. 87; Beihler v. Coonce, 9 Mo. 351; Maclot v. Dubrueil, 9 Mo. 489; Montgomery v. Sandusky, 9 Mo. 717; Joyal v. Rippey, 19 Mo. 665; Janis v. Gurno, 4 Mo. 459; Lawless v. Newman, 5 Mo. 240; Cerre v. Hook, 6 Mo. 474; Gurno v. Janis, 6 Mo. 330; Carondelet v. Dent, 18 Mo. 296-7; Clark v. Hammerle, 36 Mo. 637; Soulard v. Allen, 18 Mo. 595; Fine *et al.* v. Schools, 39 Mo. 59.)

II. The evidence relied upon by the defendant, of title to the possession of the land sued for in the inhabitants of the town of St. Louis, as a part of the commons, did not, as a matter of law, show a title equal to and countervailing plaintiffs' title: 1, because the act of 1812 furnishes no evidence whatever to designate the extent, boundaries, or location of the St. Louis commons; 2, because the survey of such commons, No. 3125, furnishes no evidence that the lot in dispute was not cultivated and possessed by Benito Vasquez prior to the 20th of December, 1803. This survey, *prima facie*, gives to the city all lands within its boundaries not used by private individuals; and a proof of actual inhabitation, possession, or cultivation, prior to December 20, 1803, of a particular lot, though within the out-boundary of the commons survey, by an individual, excludes such land from the effect of the U. S. survey of the commons. (Mackay v. Dillon, 4 How. 421; LeBois v. Brammell, 4 How. 457-64; City of St. Louis v. Toney, 21 Mo. 251; Vasquez v. Ewing, 24 Mo. 31; and other cases cited above.)

III. The evidence relied on by defendant—to-wit: the act of June, 13, 1812, and U. S. survey 3125—makes only a *prima*



*facie* case of title to all the land within said out-boundary of said commons survey; but the evidence relied on by plaintiffs—to-wit: the same act of 1812, and the supplemental act of 1824, and Recorder Hunt's certified list and the certificate of confirmation, and U. S. survey 2965, covering the four by eight arpents sued for—makes also a *prima facie* title to the said land in the legal representatives of Benito Vasquez; so that this much of the record only presents two *prima facie* cases of equal dignity—a *prima facie* title for the defendant, and a *prima facie* title for the plaintiff, to the same land. But plaintiffs rely on the further evidence of actual proof of possession, inhabitation, and cultivation, prior to December 20, 1803, by living witnesses; and this last named evidence, as a matter of law, shows a title in plaintiffs superior to and countervailing defendant's *prima facie* title. (Carondelet v. Dent, 18 Mo. 296-7; Vasquez v. Ewing, 24 Mo. 31; City of St. Louis v. Toney, 21 Mo. 251; Beihler v. Coonce, 9 Mo. 351; Hunt's Tabular Statement; Somers v. McGill, 15 Mo. 87; Gamache v. Pequignot, 17 Mo. 323-4; Gamache v. Pequignot, 16 How. 46; Mackay v. Dillon, 4 How. 442.)

IV. The lot sued for is an out-lot within the meaning of the act of June 13, 1812. (Toney v. City of St. Louis, 21 Mo. 251; Eberle v. Schools, 11 Mo. 265.)

V. The jury found, on the evidence relied on by the plaintiffs, that Benito Vasquez, the ancestor of plaintiffs, did inhabit, cultivate, or possess, prior to the 20th of December, 1803, the land sued for, which was an out-lot within the meaning of the act of June 13, 1812; and, so finding that the said land was inhabited, cultivated, or possessed, the jury necessarily found that it could not be commons, although within the out-boundary survey of the St. Louis commons.

VI. The existence of commons in any particular direction does not negative the idea of private claims in the midst of them. Private claims did exist in the Carondelet commons and also in the St. Louis commons, and the titles to some of them this court has declared to be superior to that of the commons title. (Toney v. City of St. Louis, 21 Mo. 251; Carondelet v. Dent, 18 Mo. 296-7; De Ward's map of St. Louis commons.)

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VII. There was no abandonment of his claim to the lot sued for by Benito Vasquez or by his legal representatives. Any abandonment to affect this lot must have taken place before 1803. The question of abandonment is peculiarly a question of fact for the jury, and this question was fairly and fully presented to the jury by the instructions, in every conceivable shape, upon the evidence, and the jury found that there was no abandonment; and therefore their verdict should not be disturbed. (Clark v. Hammerle, 36 Mo. 637, and cases therein cited; Fine v. Public Schools, 39 Mo. 59.)

VIII. The instructions given for the plaintiffs, and those given for the defendant, presented the case fully and fairly on the question of title, of identity, and of abandonment. (Clark v. Hammerle, 36 Mo. 637; Fine v. Public Schools, 39 Mo. 59; City of St. Louis v. Toney, 21 Mo. 251.)

HOLMES, Judge, delivered the opinion of the court.

In the case of Vasquez v. Ewing, 24 Mo. 31, in which the plaintiff stood upon the same list and survey which are again presented in this record, it was decided that the commons title, under the act of June 13, 1812, with an approved survey, was equivalent to a patent, and must prevail, unless the plaintiff could prove the facts necessary to show that no title passed; and it was conceded that this might be done by actual proof that the claimant had inhabited, cultivated, or possessed a lot, within the meaning of that act, prior to the 20th day of December, 1803, situated within the boundaries of the survey of the commons; for that if the land were an out-lot it could not have been commons.

In this case, besides the documents mentioned, the plaintiffs introduced the recorder's certificate No. 78, dated February 17, 1852, accompanied by the plat and description of the survey No. 2965, and certifying that, under the acts of Congress of 1812 and 1824, "the legal representatives of Benito Vasquez have been confirmed in their claim to an 'out-lot' south of and near to the town of St. Louis, containing four arpents front by eight in depth, so as to include the spring usually called Benito's

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Spring," and that the said out-lot had been regularly surveyed, as appeared from the accompanying plat and description.

The testimony of witnesses was also offered to prove the existence of the facts prior to 1803, which were necessary to be proved in order to bring the land in controversy within the operation of the act of Congress of the 13th of June, 1812, as a grant of title to this land as an out-lot of the town of St. Louis, within the meaning of the act.

It is obvious that if this land had been such an out-lot it could not have been commons. The plaintiff undertook to establish the fact that it had been and was an out-lot, within the direct operation of that act.

It has been settled that the existence of the facts necessary to constitute such a lot is a matter of fact for the jury to determine, but that what facts will constitute an out-lot is a question of law for the court. (Page v. Scheibel, 11 Mo. 182; City v. Toney, 21 Mo. 256.) To constitute such a lot it must be shown to have had an existence, as such, under the former government, prior to the 20th day of December, 1803, with a definite location and boundaries. Such is the theory upon which the uniform course of decision, in cases arising under these acts, has proceeded. Town lots, out-lots, common field lots, and commons, were known and recognized parts of the Spanish town or commune (*del commune*) of St. Louis. They existed by public authority, whether by concession, custom, or permission. It has been held not necessary to prove any concession or permission of the authorities. The legal history of the country would doubtless show that they never existed without permission; but whenever the fact of claim, inhabitation, cultivation, or possession of such a lot, adjoining and belonging to the town, with ascertained or ascertainable location and boundaries, prior to 1803, can be proved, the permission of the authorities may be implied, and is to be presumed. (Harrison v. Page, 16 Mo. 205; Guitard v. Stoddard, 16 How. 494; Fine v. Schools, 30 Mo. 176.) It is not enough merely to prove inhabitation, cultivation, or possession, somewhere on the land claimed. (City v. Toney, 21 Mo. 255.) It would be evidence to go to the jury to prove that particular fact. There must also be

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evidence of the location and boundaries of the lot claimed. The act of 1812 was not a grant of lands to be located by survey. It was not a floating grant.

The documentary evidence might be disposed of upon the authority of *Vasquez v. Ewing*, 24 Mo. 31, without more. It was held that *prima facie* evidence only was not enough to surmount the commons title, and it was deemed that "Congress may pass a title, and then, by a subsequent act, require less evidence to defeat that title than was required when it was first conveyed." In truth, these documents, when admitted, furnished no evidence of the existence of any definite location and boundaries of this supposed out-lot. They did not prove all the necessary facts. Whatever *prima facie* effect they might have in any case, that effect in this case was rebutted and disproved as against the defendant, who stood in a position to call their validity in question. The extract from Hunt's list describes the lot as "four arpents in front, eight deep, bounded in front by the commons or vacant land; then running back eight arpents, so as to include the spring usually called Benito's Spring." It does not appear that any other location, boundaries, or description, was proven before the recorder. Here we have a parallelogram of four by eight arpents, lying in an eastwardly and westwardly direction, so as to include the spring. There was a given outline, but no fixed, no ascertainable location. It is a floating claim merely, which could be located only by the political government acting through the Surveyor-General. This officer had no authority by law to assign a location to such a claim. He had authority only to survey such lots by their definite location and boundaries, as they had actually existed prior to 1803, or as the same had been proved before the recorder. It does not appear that he had any other basis for his action than this extract from the list which had been transmitted to him by that officer. He could derive none from instructions. Of fixed or ascertainable landmarks or boundaries that had existed before the change of government, there were none. The survey does not purport to have found any such landmarks or calls, nor to have ascertained them by any evidence, on the ground. The springs and the remains of the cabin furnished no evidence of

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boundaries. The field notes show that the surveyor adjusted the variation of his compass by the lines of a former survey in the neighborhood, and began this survey at a point forty-five links south of the south boundary of that survey, where he established a corner and ran off a parallelogram so as to include the spring and the cabin site. This parallelogram was made to lay more southeastwardly than eastwardly. No reason appears for his starting at that point rather than any other that would make the survey include the spring. It is evident that his proceeding was wholly arbitrary. Nor had his superior officers of the land office any authority by law to create by instructions a definite location and boundaries for such a lot, where none existed before. The certificate, independently of the survey annexed, was no more definite than the list. We think it is apparent that these documents, even if admissible as *prima facie* evidence of what they could show, furnished no proof of any definite location for this lot. At most, they show only an inhabitation, cultivation, and prosession, prior to 1803, and a claim made of a tract of four by eight arpents of land, lying somewhere around the Benito Spring. This was no tract of land, and no out-lot. (Menard v. Massey, 8 How. 309; Stanford v. Taylor, 18 How. 412; United States v. Lawton, 5 How. 28.) If this had been a grant of land to be located by official survey, there is no doubt such a survey as this would have been binding on the government and the parties occupying it. In this class of cases, however, the political power to locate the claim was not retained by the government; the question of location and boundaries was left to the courts. The location that was made can be regarded only as the arbitrary and unauthorized determination of the surveyor. (Ott v. Soulard, 9 Mo. 595.) It is the right and claim that is confirmed by the act, and not merely the possession or cultivation; but there can be no right and claim to an out-lot without boundaries and location.

The act of May 26, 1824, directed the individual owners or claimants to designate their said lots by proving "the fact of such inhabitation, cultivation, or possession, and the boundaries and extent of each claim, so as to enable the Surveyor-General to



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distinguish the private from the vacant lots ;” and the recorder was directed to furnish the Surveyor-General with a list of the lots so proved, “to serve as his guide in distinguishing them from the vacant lots” to be set apart for schools. (4 U. S. Stat. 65, §§ 1, 3.) These provisions presuppose that such lots already had an existence, with a location, extent, and boundaries, capable of being ascertained and distinguished by the Surveyor-General. It is not doubted that authority was conferred upon him to survey these lots for the purposes of the act ; but there is still no ground for the inference that he was empowered to create a lot by assigning a location or boundaries where none existed before, or where none had been proven before the recorder. The owners or claimants were to prove the extent and boundaries of their lots, and the recorder was to furnish a list of the lots so proved. It is manifest that if the proof made failed to show any ascertainable boundaries, the list furnished could not enable the surveyor to perform the duty required of him. It would be all the same thing as if no proof had been made and no list furnished. Such being the case here, the survey that was made can have no validity against the defendant.

It is believed that in all the cases in which the certificate of confirmation has been held to be *prima facie* evidence of the facts required to be proved, the record of the proof made, or the registry or list of claims proved, or the certificate itself, when issued by the recorder before a survey, contained calls and description of location, extent, and boundaries, that were capable of being ascertained and identified on the ground by survey, or by the calls and landmarks, or description, without a survey. In some of the cases the calls and description were somewhat indefinite, but it was still practicable to ascertain the location and fix the boundaries indicated by evidence of identification by the calls, description, and character of the lot. (City v. Toney, 21 Mo. 243 ; Harrison v. Page, 16 Mo. 182 ; Page v. Scheibel, 11 Mo. 187.) In these cases, the sufficiency of the calls and description contained in the certificate or the tabular list, to admit of identification, was not questioned.

In the case of Gamache v. Pequignot, 17 Mo. 310, the supple-

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mentary list and certificate, being acts of Hunt's successor in office, based upon the minutes, were held void, as done without authority of law, for the reason that the recorder had omitted to enter the claim on his registry or list as a claim proved, and the Land Department had refused to record the survey; but we are not aware that it has ever been maintained that the mere fact that a claim was placed in that list was to be taken as evidence that the lot had been proved, as required, as to extent and boundaries, whether such extent and boundaries were shown by it or not, or where none were shown. The list has been held admissible to prove the same facts as the certificate. Aside from the survey, this certificate proves no more than the list. The minutes and the list were the only evidence that remained in the office of the recorder by which it could be made to appear to a successor in the office that such proof had been made before the recorder within the eighteen months, or at any time. The list is the only evidence produced here to show that such proof had been made. It appears to have been the sole basis of the action of the Surveyor-General, and of the recorder, who issued the certificate upon the return of the survey to his office, in 1852. The list did not show any ascertainable location, nor any boundaries that were capable of being identified on the ground. There was, then, no foundation or warrant for this action of the surveyor or recorder. Whatever *prima facie* effect might be due to the certificate in the first instance, when offered in evidence, was effectually rebutted and disproved, as to location and boundaries, by the list and survey that were produced with it. The list was the only legal warrant for the surveyor. He might resort to other evidence to enable him to execute what he was authorized to do; but he was not authorized to locate a floating claim. It does not appear by the survey, nor by the field notes, that he had any other record evidence before him but this list, nor that he ascertained any calls whatever for location of boundaries, otherwise than by a purely arbitrary proceeding of his own. The recorder could act only upon the records remaining in his office. It was not denied, in *Gamache v. Pequignot*, that the recorder might act upon claims proved before his predecessor in office, but it was held that when

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the first incumbent of the office had acted, and furnished a list to the surveyor, the law would draw the conclusion that claims not within the list were claims not proved to his satisfaction. The claim which the plaintiff presents here, so far as the location and boundaries are in question, was not embraced in the list. The conclusion to be drawn from this evidence must be that no location and boundaries were proved before the recorder. It must follow that the claim of the plaintiff to this land as an out-lot was never proved before that officer, and that the documents furnished no sufficient evidence to entitle the plaintiff to recover, as against this defendant, standing on the commons title. Nor could this survey be properly regarded as evidence of boundaries, in connection with the actual proof of inhabitation, cultivation, or possession of a part by one claiming the whole.

We have next to consider how the case stands upon the parol evidence of facts *in pais*. It may be conceded that if this land were an out-lot at all, the proof would sufficiently show that it was situated "in, adjoining, and belonging to, the town." It must have been a part of the commons or civil dependency of the Spanish town. (*Eberle v. Schools*, 11 Mo. 265; *City v. Toney*, 21 Mo. 243; 3 *Codigos Espagnoles*, 336, lines 9-10, tit. 28, *partidas* 3.)

The authorities recognize the theory that when a lot of this kind is to be proved by evidence of facts *in pais*, it must be shown to have existed, in the character of an out-lot, prior to 1803, with designated and ascertainable location and boundaries, though actual occupancy or cultivation may not be essential to establish the existence of such lot. (*Trotter v. Schools*, 9 Mo. 86.) The act of 1812 operated to confirm "an existing and recognized claim or title, with ascertained boundaries, or boundaries which could be ascertained." (*Guitard v. Stoddard*, 16 How. 512.) Where such boundaries can be proved, a survey is not necessary to the perfection of the title. In cases of lots assigned to the schools, it has been held that where a vacant piece of land, marked out only by surrounding surveys or by other lots, has been designated and set apart to the schools as a vacant lot, the survey and assignment will prove that the land was a lot, until some third

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party can show a better title. (*Kissell v Schools*, 18 How. 25; 16 Mo. 553.) This principle can have no application to a case like this. There was no such designation of boundaries for this lot. The plaintiff must establish by proof that the land claimed had the character of an out-lot, with definite location and boundaries, and was claimed, inhabited, cultivated, or possessed, as such out-lot, prior to the 20th day of December, 1803. Actual proof is made of inhabitation, cultivation, and possession, on ground within this claim; but there is no actual proof of the location and boundaries of the whole lot claimed, nor that any such out-lot ever existed prior to that date, with the location and boundaries that are now claimed.

It may be said, in general terms, that this testimony was no more effective or complete than the documentary evidence. It afforded no additional proof as to the definite location and boundaries. The witnesses speak of the springs, an old cabin on rising ground, and a fence inclosing the cabin and three or four arpents of land north of the spring. The proof of inhabitation, cultivation, or possession, is confined to these facts. There is not the least indication of any boundaries or any definite location of a lot of four by eight arpents. The situation of the fence mentioned is not ascertained with any certainty as to its locality. There is nothing in the whole testimony by which the outline of the given parallelogram would be anywhere definitely fixed on the earth's surface. It ascertains no metes and bounds. It designates no calls or description of boundary. No facts are proved by which the location and boundaries could possibly be made certain.

The proof wholly failed in this essential element: in the character and description of an out-lot, within the meaning of the act of Congress. This was a question of law. It was not a matter of fact to be determined by the jury, when there was no evidence of the fact before them.

The concession offered in evidence by the defendant has no material effect upon the case. It gave no definite location and boundaries, though boundaries might have been established under it by actual possession and fixed landmarks. But it was re-annexed to the royal domain. The marginal entry of the Lieutenant-

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Governor was a part of the official document. Such entries in relation to other lots than the one in litigation have been held to be admissible evidence to show that the practice of abandonment and re-annexation prevailed under the former government, and, *a fortiori*, it must be competent to show an actual re-annexation of the very land conceded. This land may have been conceded again, or a claim and possession might have been subsequently established. There can be no question of an abandonment until a claim to the land, as an out-lot, has been established by proof.

There was some evidence, on the part of the defendant, that Vasquez had been required by the public authorities to remove his cabin and fence from this ground, and that they were removed to his farm on the river, beyond the area of the claim for commons. It is a part of the legal history of the town that other persons were compelled, in like manner, to give up their possessions on land lying within the limits of the commons, as unlawfully interfering with the public right of commons. This course was sanctioned by the Spanish laws, usages, and customs. Trespassers were driven off and were liable to punishment. Allowing to the proof made all the force it must reasonably be entitled to, it would show scarcely more than that Vasquez or his negroes had been suffered for a time to continue a cultivation and possession, and an actual occupancy, on an indefinite spot of ground near the spring, within the area of the public commons, which was treated by the authorities of the former government, and ought to be considered here, as an unwarrantable interference with the commons right of claim.

But we do not rest our decision upon this part of the case. However this fact may have been, we are satisfied, upon a careful examination of the whole evidence, that it was not sufficient in law to warrant a jury in finding a verdict for the plaintiff, and the jury might properly have been so instructed.

An instruction was refused for the defendant, which read as follows:

“The act of Congress of the 13th June, 1812, by its own force, confirmed to individuals only their rights, titles, and claims to town or village lots, out-lots, and common field lots, in, adjoin-



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ing, or belonging to the town; and there is no evidence here to prove that the tract of land here sued for is either a town lot, an out-lot, or a common field lot."

According to the view we have taken of the case, this instruction should have been given.

The defendant, standing upon a title from the United States, which must be deemed equivalent to a patent, of the date of the 13th of June, 1812, was in a position to call in question the validity and effect of the documentary evidence issued from the office of the Surveyor-General and Register of Land Titles. (McGill v. Somers, 15 Mo. 80; Robbins v. Eckler, 36 Mo. 506; Ott v. Soulard, 9 Mo. 595.)

The first instruction given for the plaintiffs was erroneous in assuming that there was evidence before the jury from which they might infer the existence of the land in dispute as an out-lot, with definite location and boundaries, prior to 1803.

It is not deemed necessary to notice the other instructions in detail.

The judgment will be reversed and the cause remanded. The other judges concur.

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JOHN BYRNE, JR., Appellant, v. THEODORE H. BECKER *et al.*,  
Respondents.

1. *Witnesses—Deed of Trust—Testimony of Maker—Incompetency of, under Statute.*—Under the second subdivision of section six of the act concerning witnesses (R. C. 1855, p. 1578), testimony of the maker of a deed of trust, tending to show that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out, or that a large portion of it was the amount of an order for goods never delivered to him, and that, by the advice and direction of the parties for whose benefit the deeds were executed, this sum was falsely stated for the purpose of deterring his other creditors from proceeding against his property, was incompetent.
2. *Attachment—Deed of Trust—Intent of Maker to hinder and delay not participated in by Beneficiaries.*—An intent on the part of the maker of a deed of trust, in the execution of the instrument, to hinder, delay, or defraud his creditors, unless such intent was participated in by the beneficiaries in the deed, does not render it fraudulent and void.

*Appeal from St. Louis Circuit Court.*

This suit is brought, on the ground of fraud, to annul the title of defendant to a piece of realty in the city of St. Louis. Both parties claim under McCarthy: plaintiff, under a judgment in attachment; respondents, under a voluntary deed of trust made prior to the attachment, and a sale under the deed subsequent to the attachment. McCarthy kept a shoe-store on Market street, and also owned the realty in dispute. On the 22d of October, 1859, McCarthy executed two deeds of trust to Joseph W. Werner, as trustee of Douglass, Gazzam & Co.—the one conveying all the goods in his store, the other the realty in dispute—both to secure the same set of notes. At the sale under the realty deed of trust, Becker became the purchaser.

Other facts in the case appear in the opinion of the court.

On the trial, plaintiff asked for the following instructions, which the court refused, and plaintiff then and there excepted:

1. If the jury believe from the evidence that the deed of Robt. E. McCarthy to Werner, trustee of Douglass, Gazzam & Co., on the house and lot in controversy, was with the intent to hinder, delay, and defraud the creditors of McCarthy, and that at the date of its execution the indebtedness through which plaintiff acquired title existed, then the deed is inoperative to bar the rights of plaintiff, and the jury will find accordingly.

2. If the jury believe from the evidence that, at the time of the deed of trust given by Robert Emmet McCarthy to Werner, as trustee of Douglass, Gazzam & Co., on the house and lot, the subject matter of this litigation, the said McCarthy was justly indebted to Douglass, Gazzam & Co., but in a sum less than that secured by said deed of trust—but that the debt so secured was for a larger sum than the amount really due, and that it was so made with the intent to secure to said McCarthy the advantage of future purchases to be made by him of Douglass, Gazzam & Co., and with the intent to hinder, delay, or defraud the creditors of said McCarthy—then the transaction is fraudulent, and the jury should find accordingly.

3. If the jury believe from the evidence that the conveyance

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by Robert Emmet McCarthy to Werner, as trustee of Douglass, Gazzam & Co., on the house and lot, the subject matter of this suit, was not made in good faith, but with the intent to hinder, delay, or defraud creditors of said McCarthy, they should find the issue for the plaintiff.

The only instruction given by the court on the subject of fraud was in these words: "If the jury believe from the evidence in this cause that McCarthy, at the time he made the deeds of trust mentioned in the petition, was indebted to the plaintiff or any person other than the said Douglass, Gazzam & Co., and that such deeds were made to hinder, delay, or defraud the plaintiff or other creditors of his or their lawful demands, and that said Douglass, Gazzam & Co. knew of such fraudulent attempt, then the jury will find the first issue in the affirmative." To the giving of which plaintiff duly excepted.

The jury having found both issues in the negative, and the court having given judgment for the defendants, plaintiff in due time moved for a new trial, which having been overruled, defendant then and there excepted and brought the case here by appeal.

*A. J. P. Garesche*, and *Farish*, for appellant.

*Holmes & Martin*, for respondents.

FAGG, Judge, delivered the opinion of the court.

This was a suit instituted in the Land Court for St. Louis county by the appellant, Byrne, for the purpose of having a conveyance to the respondent, Becker, of certain property in the city of St. Louis annulled and set aside. Both parties claimed title to the property under one Robert E. McCarthy. The plaintiff's title consisted of a conveyance by the sheriff of St. Louis county to him as the purchaser of the property, at a sale under a proceeding against McCarthy by attachment. Becker claimed under a sale made by a trustee, in pursuance of a deed of trust executed prior to the attachment. Upon the pleadings in the cause, two issues of fact were, by the direction of the court, submitted to a jury. The first was, whether the deed of trust was made by McCarthy with intent to hinder, delay, or defraud his

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creditors ; and, second, whether the purchase made by Becker was made under any agreement or understanding between himself and the *cestui que trusts* that he would hold the same in trust for them. Both issues being found for the defendants, judgment was accordingly rendered for them, and an appeal taken to this court. There seem to be but two grounds of objection taken to the proceedings in the court below, and we proceed to examine them in the order stated by the counsel for the appellant.

Two deeds of trust were executed bearing the same date, and both intended to secure the same indebtedness. One, executed by McCarthy and wife, conveyed the real estate in question ; and the other, by McCarthy alone, covered a stock of goods in the city of St. Louis, consisting of boots and shoes. The deposition of McCarthy was read by the plaintiff at the trial, portions of it being objected to on the part of the defendant, and excluded by the court. These portions consisted mainly of statements tending to show that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out ; that a large part of it was the amount of an order for goods never delivered to him ; and that, by the advice and direction of the parties for whose benefit the deeds were executed, the sum was falsely stated for the purpose of deterring his other creditors from proceeding against his property. We think the court committed no error in excluding this evidence. By the sixth section of chapter 168, R. C. 1855, after enumerating certain classes of persons who are incompetent to testify, it is provided as follows : " Nor shall any grantor, vendor, or assignor, in any deed, instrument, or writing, affecting property, real, personal, or mixed, or any claim or right therein or therefrom, be a competent witness to alter, change, or qualify the proper effect and operation of the words and terms of such deed, instrument, or writing."

By attaching to the words used in this section their ordinary force and meaning, it seems to be clear that the testimony was incompetent. If any other construction has been given to this statute, we have been unable to find it. In the case of *Bidwell et al. v. The St. Louis Floating Dock & Ins. Co.*, 40 Mo. 42, cited by appellant's counsel, the real point decided by the court was that the condition

precedent not having been complied with, the policy had no binding effect, and, therefore, that Scott, who was held to be a competent witness in the cause, did not stand in the relation of assignor to the plaintiffs. The facts in that case, as shown by the testimony of Scott and others, proved most conclusively that by his failure and neglect to perform the conditions required by the company, he lost all benefit in the policy, and, the right of the plaintiffs being simply derivative, they had acquired nothing by the deposit of the policy with them.

The case of *Perry et al. v. Siter et al.*, 37 Mo. 273, simply presented the question of the competency of the assignor of a note indorsed in blank, merely for collection, to prove that there was no actual consideration moving from the assignee that would cause a beneficial interest in him.

It was held that such an indorsement "imports a valuable consideration, so far as to vest the legal title to the note in the assignee. \* \* \* \* The beneficial interest depends upon the actual consideration, and that is an extrinsic fact." Hence, the conclusion arrived at in that case was that it was not intended to apply to the indorser of a note transferred in that way and for the purpose stated. Any other construction of the statute might "enable an unfaithful agent to defraud his principal." It would be an easy matter, in a case of this sort, to show how a grantor might combine and confederate with a party acquiring a subsequent claim to the property to destroy the force and effect of his own deed. It is not necessary to discuss such a proposition, nor to examine the facts shown by the record, to see whether in point of fact there was any reason to suspect such a combination in this case. It is enough that the excluded testimony comes within the express terms of the statute.

The next ground of complaint is in reference to the instructions given and refused by the court. Three declarations of law were asked by the appellant, all of which were refused. They were all based mainly upon the idea that if there was any intent upon the part of McCarthy, in the execution of the deed of trust covering the real estate in question, to hinder, delay, or defraud his creditors, whether participated in by his beneficiaries in the deed or not,



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it was fraudulent and void. We are not aware that any such construction has ever been claimed for this statute. No decision of this court has been found that goes to that extent. To say that a grantee in a deed, without notice of any fraudulent intent on the part of the grantor, and wholly without evidence tending to show that he had assisted in carrying out such intent, should be compelled, as in this case, to lose the amount of his debt thereby secured, would be equivalent to saying a man should suffer the penalty of a crime which he had not committed.

The court, of its own motion, gave an instruction which required not only the finding of a fraudulent intent on the part of McCarthy, but also a knowledge of the same by the parties for whose benefit the deed was made, in order to make the transaction fraudulent and void. This presented the whole question of fraud properly to the jury, and its action must be sustained.

The jury having found the issues for the respondents under the law as declared by the court, and upon the facts proved, we shall not disturb its verdict. As to other points of objection in relation to the admission of testimony, we see nothing that would have seriously affected the minds of the jurors or changed the character of the verdict.

Judge Wagner concurs in affirming the judgment. Judge Holmes, having been of counsel in the court below, did not sit.

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JOSEPH P. VASTINE, Public Administrator, having in charge the estate of John Shannon, deceased, Respondent, v. JOHN W. DINAN and JOHN MERRICK, Appellants.

1. *Administration—Set-off against suit of administrator, when admissible.*—The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.

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2. *Administration—Payment of debts—Claims of heirs for shares in estate, when brought.*—Before heirs have any right of action against the administrator for their distributive share of the estate, the debts against the estate must not only be paid, but distribution must be ordered by the appropriate tribunal.

*Appeal from St. Louis Circuit Court.*

This was an action originally commenced in the Probate Court of St. Louis county, under section 67, article I., of an act concerning executors and administrators (R. C. 1855, p. 126; Gen. Stat. 1865, p. 487, § 68), and thence appealed to the Circuit Court. John Shannon died in April, 1861, and thereupon his brother Joseph became his administrator, the appellants becoming securities on the administrator's bond. Joseph Shannon died in October following, and before the time of making his first annual settlement. The respondent took charge of John Shannon's estate to administer the same in February, 1865, and, as successor to Joseph Shannon, instituted legal proceedings against the securities of Joseph Shannon, former administrator, to ascertain the amount of money in the hands of such deceased administrator, in his representative capacity, at the time of his death.

Other facts appear in the opinion of the court.

*Davis*, and *Davis & Evans*, for appellants.

*Grace*, for respondent.

I. Defendant's claim cannot, in an action against an administrator's securities, be pleaded by way of off-set. (State, to use of Cowan, v. Modrell *et al.*, 15 Mo. 421; Woodward *et al.* v. McGaugh, 8 Mo. 161.)

II. The statutes provide a specific method to be pursued by Joseph Shannon to establish this demand against the estate of his intestate, John Shannon, which method has not been adopted. (R. C. 1855, p. 154, § 12; *id.* p. 156, § 24.)

III. Upon the death of Joseph Shannon, the right to assert this claim against the estate of John Shannon survived only to the executor or administrator of Joseph Shannon, and such executor or administrator cannot have that right taken away from him by any action of these appellants in claiming the right to assert it,

and he would not be barred from asserting the same by the decision of the Circuit Court allowing these appellants to avail themselves thereof.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought on an administrator's bond, made by one Joseph Shannon as principal and the appellants as securities. It appears that John Shannon died in the spring of 1861, leaving certain property and personal effects in the city of St. Louis, and that his only heirs at law were his brother, Joseph Shannon, and a couple of children of a deceased brother. Joseph Shannon obtained letters of administration from the Probate Court, and administered on the estate, the appellants being sureties on his bond. After reducing the assets into possession, Joseph died, in the fall of 1861, without having made any settlement with the court, and this suit was instituted to ascertain the amount due the estate and recover the same.

When the cause came on for trial in the court below, the appellants offered to prove that John Shannon was, at the time of his death, indebted to his brother Joseph in the sum of fourteen hundred and forty dollars for board, which was set up and claimed as a set-off, but the court ruled out the testimony, and held that it constituted no defense. Evidence was also offered to show that Joseph's widow, after the death of John, paid two hundred and fifty dollars on a debt for which the estate of John was liable. Upon objection being made, this evidence was excluded. It was further contended that as Joseph was entitled to one-half of the estate as heir at law, he ought to be permitted to retain the same, and therefore the respondent should not have judgment for that amount. But the court overruled this defense, and found for the respondent.

The first question to be determined is whether the court rightfully rejected the appellants' set-offs. The second section of the act regulating set-offs (R. C. 1855, p. 1462) provides that in suits brought by administrators and executors, debts existing against their intestate or testator, and belonging to the defendant at the time of their death, may be set off by the defendant, in the

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same manner as if the action had been brought by and in the name of the deceased. But this section was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate.

The case of *The State v. Modrell et al.*, 15 Mo. 421, is in point, and holds that a claim against the principal and securities on an executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity; and an indebtedness of the plaintiff to the testator in his lifetime cannot be set off against it. The proceeding in the present case was against the securities in their individual capacity, upon their personal obligation, and the set-offs by which they sought to shield themselves from liability were clearly inadmissible.

The next position assumed—that Joseph Shannon, being one of the heirs, was entitled to retain one-half of the estate—is wholly untenable. The administration was not completed, and there was no means of ascertaining his distributive share till the debts were proved up and paid and the proper order made by the Probate Court. Before heirs have any right of action, the debts against the estate must not only be paid, but distribution must be ordered by the appropriate tribunal. (*State v. Fulton et al.*, 35 Mo. 323.)

The judgment is affirmed. The other judges concur.

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LUCIEN EATON, Administrator *de bonis non* of Mary Ann Dubois, Respondent, v. THOMAS WALSH and JOHN G. PRIEST, Appellants.

1. *Administration—Debts from administrator to testator, when assets.*—Where a banking house issued a certificate of deposit to one who afterward died, and a member of the banking house became administrator, the debt evidenced by the certificate will be considered assets in his hands, within the meaning of the twenty-eighth section of the second article of the act concerning administrators, even though the certificate never came into his possession. (R. C. 1855, p. 133; Gen. Stat. 1865, p. 492, § 31.) And it is immaterial that the debt was a partnership one, as, under the laws of this State, each member is liable individually for the obligations of the firm.

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2. *Probate Court—Appeals—Bonds—Judgments against securities.*—The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court.

*Appeal from St. Louis Circuit Court.*

*Garesche & Mead*, for appellants.

I. The defendant, Anderson, not being served with notice of the proceeding herein, the court below had no power to make any order against him, or enforce such order or judgment against his securities on the administration bond of said Anderson, and the judgment is therefore void. (Smith v. Ross, 7 Mo. 463; Anderson v. Brown, 9 Mo. 646; Roach v. Burnes, 33 Mo. 319.)

II. A judgment is an entirety, and if void as to one defendant is void as to all. (Covenant Mutual Ins. Co. v. Clover, 36 Mo. 392; Dickinson v. Chrisman, 28 Mo. 135.)

III. The judgment is erroneous, because the statute (Gen. Stat. 1865, p. 487, § 67) authorizes executions against the securities only for money in the administrator's hands. There is no evidence that Anderson had any money; he stated in his inventory he had a certificate of deposit; and for such assets the section mentioned provides that an attachment shall issue against the person of the administrator.

IV. The court below had no power under the laws to enter judgment against Taylor and Sanguinette, securities for Priest and Walsh on the appeal bond from the Probate to Circuit Court. The law regulating appeals from justices' courts authorizes such a judgment, but there is no such provision in the act regulating appeals from the Probate to the Circuit Court.

*Jewill*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding commenced in the St. Louis Probate Court, under section 66 of the first article concerning administrators. (R. C. 1855, p. 126.)



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It appears that John J. Anderson obtained letters of administration on the estate of Mary Ann Dubois, deceased, and that the appellants were the securities on his official bond. Anderson made his first annual settlement with the court, wherein it was found that assets came to his hands belonging to the estate amounting to nineteen hundred and twenty-eight dollars and seventy cents, and that he had paid out two dollars and five cents, leaving a balance against him, in favor of the said estate, of nineteen hundred and twenty-six dollars and sixty-five cents. After the filing and acceptance of the settlement, Anderson removed to New York, and his letters were revoked on the ground that he was a non-resident; and this proceeding was instituted by the administrator *de bonis non* to recover the money and property in his hands.

Anderson was not served with notice, but appellants were, and the Probate Court rendered judgment against them for the amount of money in the hands of Anderson belonging to the estate, and ordered Anderson to deliver over to his successor a certain note in his possession against Page & Bacon.

That part of the judgment requiring Anderson to deliver over the note was not warranted, as he was not served with notice, and was not within the jurisdiction of the court. But the point is not material, as the judgment of the Probate Court is not the one we are now called upon to review. An appeal was taken to the Circuit Court, and the cause submitted without the intervention of a jury, and the court in its judgment found as facts that at the time of the revocation of the letters of John J. Anderson, as administrator of the estate of Mary Ann Dubois, there was in his hands the sum of fourteen hundred and ninety dollars in cash; and it was therefore ordered and adjudged that he pay over forthwith that amount, with interest, from the date on which the letters were revoked; and in default of his so doing, execution was ordered to issue against the appellants, his sureties. The judgment, although somewhat informal, is essentially a judgment against the appellants; and as no question of law was raised on the trial—no instructions asked for or given—every presumption will be indulged in its support.

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The counsel for the appellants contend, and it is the main point in the case, that the statute authorizes execution against the securities only for money in the administrator's hands, and that there is no evidence that Anderson had any money.

This depends entirely upon his liability for a certificate of deposit left by Mrs. Dubois at her death. The certificate was given by the banking house of John J. Anderson & Co., of which Anderson, the administrator, composed one of the members, and when he administered he inventoried it as among the assets of the estate. It is true, it does not appear that the certificate was ever in his possession, but his house nevertheless owed the debt. By the twenty-eighth section of the second article of the administration act (R. C. 1855, p. 133) it is provided that all debts due by an administrator to his testator or intestate shall be considered as assets in his hands.

It is immaterial that it was a partnership debt, as, under the laws of this State, each member is liable individually for the obligations of the firm. Anderson owed the debt, and, when he administered, by virtue of the statute it was assets in his hands.

But the counsel for the defendants have brought to our notice an error in entering up judgment in the Circuit Court. When the appeal was taken from the Probate Court, the defendants, Priest and Walsh, gave an appeal bond, with Sanguinette and Taylor as securities; the court gave judgment against the securities in the bond as well as the defendants. We have not found any statutory provision authorizing this proceeding, unless the plaintiff has taken steps to move or proceed against the securities. There is a provision of law in the statute in regard to justices of the peace, giving the court power to render a judgment against the securities in the appeal bond, but this extends no further than appeals from justices' courts, and can have no application to the present case.

Judgment was therefore erroneously rendered against the securities; but as substantial justice was done, so far as the principals in the bond were concerned, the judgment will be modified in this court and entered up against them only. The other judges concur.

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Chambers et al. v. McGiveron.—In re Partnership Bruening, etc.

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CHARLES CHAMBERS *et al.*, Respondents, v. WM. MCGIVERON  
*et al.*, Appellants.

Judgment affirmed.

*Appeal from St Louis Circuit Court.*

*Glover & Shepley*, for respondents.

*R. S. McDonald*, and *Krum & Decker*, for appellants.

HOLMES, Judge, delivered the opinion of the court.

This was an action of ejectment. The defense rested on the statute of limitations, and the plaintiffs had a verdict. The case appears to have been submitted to the jury under correct instructions, and we find no reason for disturbing the verdict.

Judgment affirmed. The other judges concur.

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IN THE MATTER OF THE PARTNERSHIP ESTATE OF BRUENING &  
OBERSCHHELP, Defendant in Error, v. WILLIAM OBERSCHHELP,  
Plaintiff in Error.

1. *Administration — Partnership Estates — Appeal — What bond required.*— A surviving partner administering on partnership effects has all the rights, incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.)

*Error to St. Louis Circuit Court.*

*J. C. Moody*, for plaintiff in error.

*Finkelnburg & Kehr*, for defendant in error.

I. Oberschelp's appeal from the Probate Court to the Circuit Court was properly dismissed. Section 4 of chapter 127, Gen. Stat. 1865, p. 514, requires every appellant to give bond, except an executor or administrator. Oberschelp was merely surviving

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partner, having the partnership assets in charge, and does not come within the exception. To appeal as executor or administrator, the appeal must be on behalf of the estate. Here the administration upon the partnership assets was ready for final settlement, which implies that all its affairs had been completely wound up and nothing further remained to be done but to distribute the balance. Therefore there was no longer any occasion to appeal on behalf of the estate, and Oberschelp could not appeal in his capacity as administrator.

II. To appeal without bond, it must be from an adverse judgment or decision against the estate, and by the administrator or executor in his representative capacity. Here there is no judgment against the estate or the partnership assets, and therefore there can be no appeal on behalf of the estate. Oberschelp does not appeal in his representative capacity, because the judgment or decision appealed from does not affect his estate, but concerns him simply in his own right, to protect which he appeals.

WAGNER, Judge, delivered the opinion of the court.

In September, 1864, William Oberschelp qualified as administrator of the partnership assets, as surviving partner, of the firm of Bruening & Oberschelp. At the March term, 1867, of the St. Louis Probate Court, he made final settlement of the co-partnership estate; and from the accounts, vouchers, and proofs submitted by him, the court found that, after allowing him all proper credits, partnership assets amounting to \$24,332.26 remained in his hands; and of this amount the court found that, according to the partnership agreement, he was entitled to the sum of \$10,266, and the estate of his deceased co-partner to the sum of \$14,066.26, and adjudged that he should pay that amount to Mary Bruening, executrix of the deceased Bruening. From this judgment Oberschelp appealed to the Circuit Court. He filed his affidavit for appeal, but gave no appeal bond. In the Circuit Court a motion was made to dismiss the appeal, because the appellant had failed to file an appeal bond. The court made an order requiring a bond to be filed within ten days, else the appeal should be dismissed. No bond being filed, the court dismissed the appeal, and the plain-

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tiff in error excepted, and took the cause to the general term, where the judgment of the special term was affirmed; and after an unsuccessful motion to set aside the judgment, and for a new trial, the case is brought here for review on writ of error.

The sole question presented for consideration is, whether it was necessary for Oberschelp to give an additional bond in order to perfect his appeal, or whether his case is distinguishable from that of an ordinary administrator or executor. When an administrator qualifies and assumes the duties of administering on an estate, the statute requires him to give bond, and he and his sureties are liable thereon for all his acts touching the estate. A surviving partner administering on partnership effects has all the rights, incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties. Now, by chapter 127, Gen. Stat. 1865, p. 514, section 1, concerning appeals in matters relating to administration, it is provided that appeals shall be allowed from the decisions of the court having probate jurisdiction to the Circuit Court on all settlements of executors or administrators, and on all apportionments among creditors, legatees, or distributees.

The fourth section enacts that every appellant shall file in the court the bond of himself or some other person, in a sum and with security approved by the court, conditioned that he will prosecute the appeal and pay all debts, damages, and costs, that may be adjudged against him. But it is provided that the chapter shall not be so construed as to require any executor or administrator to enter into bond in order to entitle him to an appeal. The action of the court appealed from was a judgment making final distribution—one of the causes specified in the statute which the plaintiff in error was entitled to have re-examined in an appellate court. I think he comes clearly within the exception of the statute exonerating an administrator from giving security on an appeal, for the very reason that induced the passage of the law—that he had already given bond, with sufficient securities, to answer for all damages resulting from his action.

The judgment will be reversed and the cause remanded. The other judges concur.



MAX DIETRICH, Defendant in Error, v. JOHN J. MURDOCK,  
CHARLES K. DICKSON, and NATHAN KOWNS, Plaintiffs in  
Error.

1. *Evidence—Admissibility—Sufficiency—Competency.*—Where the objections offered to the admissibility of a paper in evidence go, not to the competency, but merely to the sufficiency, of the statements therein made, the court committed no error in permitting it to be read.
2. *Corporations—Railroad Companies—Eminent Domain, when granted.*—Where the Legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion.
3. *Corporations—Railroad Companies—Lands—Permission to occupy—Effect of.*—Whether the proceedings of the railroad corporation were sufficient to divest the title of the owner of the land upon which the road was located, or whether he thereby had any notice of an intention on the part of the company to take any portion of his land, is immaterial, if for a number of years after the initiatory steps taken for the location and construction of the road there was no attempt on his part to prevent the execution of the work. In such case it must be assumed that the occupation of his land by the company for the purpose to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and, if compelled to leave the premises by proper proceedings, would permit such property to be removed.

*Error to St. Louis Circuit Court*

This was an action for the claim and delivery of a lot of railroad iron which had been laid down by the Callaway Mining and Manufacturing Company on land in Callaway county, belonging to Kowns, plaintiff in error. The iron was solidly spiked to sleepers, securely fastened to the land. The Callaway Mining and Manufacturing Company was a corporation created by act of the General Assembly of the State of Missouri, passed February 16, 1847 (Sess. Acts 1846-7, pp. 151-3), with power to acquire right of way and construct a railroad from Cote Sans

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Dessein, on the Missouri river, to its coal mines in Callaway county.

The company constructed its road and opened it, and, becoming indebted, made its two deeds of trust to Westlake & Filley, trustees, to secure creditors therein named; one dated November 3, 1857, the other November 17, 1857, conveying its road-bed, cars, engines, rails, iron, etc., etc.

The trustees afterward advertised and sold the property, defendant in error being the purchaser of the rails, iron, etc., in controversy. Soon thereafter Kowns removed the iron rails sued for, and shipped them to St. Louis, to Murdock & Dickson, who received them and held them for him at the time they were replevied.

At the trial, which took place at the February term, 1865, the charter of the Callaway Mining and Manufacturing Company was read by defendant in error; also a paper purporting to be the proceedings of a jury summoned to inquire into and assess the damages that might accrue by reason of the building of the railroad and depots contemplated, etc., which need not be set out here.

To the giving of this paper in evidence, the plaintiffs in error objected, for the following reasons:

1. It did not appear that any attempt had been made, previous to impaneling the jury, to agree with the owners of the land over which the track was to pass for compensation for the land taken for said track, and plaintiff (defendant in error) did not declare that he would or offer to give any evidence touching such attempt to make such agreement with said landowners.

2. The report of the jury did not ascertain the land taken from any landowner by metes and bounds, or otherwise.

3. It did not appear from said report what land was taken, or to whom the same belonged, or who was interested in the same.

4. No notice was given to any landholder of the proceedings of the said jury.

5. It appears from the report that the jury only viewed a part of the land condemned.

6. It does not appear from the report that the jury viewed

the land of Kowns (plaintiff in error), or took any evidence respecting the manner in which the making of said railroad would affect the same.

7. The jury did not ascertain by metes and bounds, or otherwise, what part of defendant's (plaintiff in error) land was taken by said railroad, nor its value.

8. It nowhere appears by said report that the company applied for any part of defendant's (plaintiff in error) land, nor whether the jury condemned the part so applied for, or a different part.

9. The jury did not certify the amount of damages which the defendant (plaintiff in error) sustained by reason of the running of the railroad through or over the land, nor did it find the same.

All which objections the court overruled and admitted the paper. The court afterward, sitting as a jury, found a verdict for defendant in error. Other facts necessary to an understanding of the case appear in the opinion of the court.

*T. T. Gantt*, for plaintiffs in error.

I. It appears from the charter of the Callaway Mining and Manufacturing Company that it was no public corporation existing or created for the accommodation of the community, but only a private affair for the benefit of a few persons, and not in any way subserving the public interest. Therefore it was not a corporation in whose aid the right of eminent domain can be exercised or delegated. (2 Kent's Com. 340; Beckman v. Saratoga & Schenectady R.R. Co., 3 Paige, 73; Varick v. Smith, 3 Paige, 159; Smith's Com. on Stat. and Const. Law, § 335.)

II. The act does not provide any judicial proceedings, or any proceedings which can be judicially the subject of review, for divesting the title of the owner of the land needed for a railroad track, under the exercise of the right of eminent domain. (North Missouri R.R. Co. v. Lackland, 25 Mo. 526-8; Backus et al. v. Lebanon et al., 11 N. H. 19-26.)

III. The proceedings to divest the title of the landholder and appropriate his property to the use of the corporation were not conformed to the provisions of the charter.

IV. The proceedings of the jury were not of such a nature that

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any review of them, or any examination of them by *certiorari* or otherwise, was practicable, and no notice whatever of the pendency of the proceedings appears to have been given to any landholder, either actually or constructively. The want of such notice is fatal. (*City of Boonville v. Ormrod*, 26 Mo. 193.)

*Sharp & Broadhead*, for defendant in error.

I. The Callaway Mining and Manufacturing Company, by the act of the Legislature of this State, had the right to procure the condemnation of the right of way, construct its road, place its engine, cars, iron rails, switches, and other appurtenances, on the road and operate them. (Sess. Acts 1847, pp. 151-3.)

II. The sheriff and jury had a survey by metes and bounds. They investigated the question of damages—advantages and disadvantages considered—as the law required. The sheriff and jury made the condemnation according to the provisions of the charter, and made a full finding and certificate, which was filed and recorded in the proper office, to which no objection was taken; and after the notice imparted by the filing and recording of the public acts of the sheriff and jury, they were acquiesced in and assented to, and never questioned by any one.

III. Plaintiffs in error cannot now, in this collateral proceeding, call in question the validity of the condemnation or of the proceedings to effect it. (Redf. on Rail. 129; *Evans v. Hoefner*, 29 Mo. 147-9.) They are estopped in this or any collateral proceeding from questioning the regularity or even validity of the proceedings or condemnation.

FAGG, Judge, delivered the opinion of the court.

The case presented by the record shows the following state of facts: The suit was instituted by the defendant in error, in the Circuit Court for St. Louis county, for the possession of a quantity of railroad iron claimed by him in pursuance of a purchase of the same from the Callaway Mining and Manufacturing Company. This iron constituted a part of the track of said company's road, laid upon the land of Kowns, one of the plaintiffs in error. In 1859 these rails were taken from the road-bed by

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Kowns, and shipped to Murdock & Dickson, at the city of St. Louis, to be sold by them for his benefit. This company, being authorized by the terms of its charter to build a railroad from its coal bank in Callaway county to the Missouri river at or near Cote Sans Dessein, proceeded, in the spring of 1851, to acquire the right of way for that purpose. A jury consisting of six men, as directed by the act of incorporation, was summoned by the sheriff of that county, and, with the county surveyor, proceeded to locate the line of the road and assess the damages to the lands upon which it was to be constructed. A certificate of their proceedings was filed in the office of the recorder of deeds for the county, and a certified copy of the same was offered in evidence at the trial on the part of the plaintiff.

The paper being admitted against the objections of the defendants below, presents the first question to be passed upon here.

The objections do not appear to have any reference to the competency of the evidence, but rather go to the sufficiency of the statements to prove that the jury proceeded to discharge its duties in the manner required by the charter. There being no objections to its competency, the court committed no error in permitting it to be read. This is all that need be said upon that point. The next objection on the part of the plaintiffs in error is the refusal of the court to give the following instruction: "The law is declared to be that the proceedings of the jury convened to condemn the road-bed and depot of the Callaway Mining and Manufacturing Company do not appear to have been in accordance with the charter, and that the same are inoperative to divest the title of any owner to the said road-bed."

The Legislature, in the exercise of its discretion in delegating to this company the right of eminent domain, evidently proceeded upon the idea that the public interest was to some extent at least to be subserved by its creation. What the precise degree of its usefulness to the public might be, is not, in our view of the case, necessary to be determined. We think that the courts of the country ought not to interfere with the exercise of this discretion, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent



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of taking the property of one individual and transferring it to another. The sixth section of the act under which this company claimed its corporate existence declares that "said company shall have the exclusive power to acquire, own, and employ steam power, or animal power, locomotives, cars, and carriages necessary for the transportation of passengers, coal, and every description of personal property on said road for themselves and other persons." Whether the private interests of this company were such as to require the construction of this road, or constituted the main reason for the act of incorporation, with the power conferred by it, is not material. It is enough that, by the terms of the law, it is made a public corporation for the use and benefit of that particular section of the State. The public had a right to demand that the means of transportation, both for passengers and freight, commensurate with its wants, should be provided by the company. Any failure of its duty to the public in this particular, and to transport passengers and freight when offered for that purpose, would have subjected the company to an action for damages. It must be assumed, then, that the grant of authority to the company to condemn the land necessary for a road-bed was a rightful exercise of legislative discretion. We do not consider it to be necessary in this case to go further into an examination of the questions raised on the part of the counsel for plaintiffs in error. We pass by the question as to whether the regularity of the proceedings of the jury can be made the subject of a collateral investigation.

It might be admitted, for the sake of the argument, that all the irregularities complained of do, in point of fact, exist; still, there is no ground upon which Kowns can rightfully claim to be the owner of the property in question. The condemnation of the ground for the proposed road, and the location of the route, were made in the spring of 1851. The company proceeded to construct and operate the road, which is admitted to have been located upon the land owned by Kowns. The report of the attempted condemnation of the property, such as it is, was duly filed in the recorder's office, and this constituted all that was required of the company by its charter. Now, whether these proceedings were

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sufficient to divest the title of the owner of the land upon which the road was located or not, or whether Kowns thereby had any notice of an intention on the part of the company to take any portion of his land, is not material. There was no attempt on his part to prevent the execution of the work.

The company was not proceeded against as trespassers, nor in any other form by which his rights might have been asserted and the authority of the company to proceed with the work inquired into. Here was a period of seven or eight years intervening between the initiatory steps taken for the location and construction of the road and the time at which this property is taken possession of by Kowns, without a word of dissent upon his part, and without any claim to the iron. It must be assumed that the occupation of this land by the company for the purposes to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and, if compelled to leave the premises by proper proceedings, would permit such property to be removed. (See *Desloge et al. v. Pearce et al.*, 38 Mo. 588, and cases there cited.)

The instruction was properly refused, and the judgment must be affirmed. The other judges concur.

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ULYSSES S. GRANT and JULIA B. GRANT, Respondents, v.  
JOSEPH W. WHITE, Appellant.

1. *Landlord and Tenant—Lease—Tenancy from Year to Year—Tenancy at Will.*—Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period for its termination, and in either case is construed to be a tenancy from year to year. But where a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, or where there is no express or implied consent, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice.

2. *Landlord and Tenant—Lease—Consent to continue in possession, how may be shown.*—Whether a possession is continued under an express or

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implied consent, is a question of fact. Circumstances may be sufficient to authorize a jury to infer an acquiescence on the part of the landlord in the tenant holding over. If the holding over by a tenant, after the expiration of his term of lease, is willful, it cannot be with consent either express or implied.

3. *Married Women—Separate Real Estate—Agents—Contract made by—Liability of Third Persons to Principal for.*—Although land belongs to a *femme covert* in her sole individual right, it is undeniably true that her husband is seized with her in the possession, and she must be held to be acting as his agent. But a man may delegate an agency to his wife, as well as to any other person; or he may ratify her acts as agent, although done without previous authorization. And an agent may make a contract in his own name, whether he describes himself as an agent or not, and his principal will be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit was given to the agent and it was intended by both parties that no resort should in any event be had by or against the principal upon it.
4. *Landlord and Tenant—Lease—Occupation under—Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.
5. *Landlord and Tenant—Lease—Possession—Construction of Statute.*—The provisions of section 27, chap. 187, Gen. Stat. 1865, cannot be invoked between the parties to an action for unlawful detainer, where defendant was lessee and held his possession under plaintiffs as lessors.

*Appeal from St. Louis Circuit Court.*

*Green & Reese, for appellant.*

I. The plaintiffs must prove a lawful possession of the real estate within three years before suit, and not merely constructive but actual possession. And it is not pretended that plaintiffs ever were in possession of the premises. (Gen. Stat. 1865, p. 732, § 27.)

II. The writing offered in evidence, signed by Julia B. Grant and Joseph W. White, did not give possession to plaintiffs. (1 Tucker, 119, and Chitty's note.) It was executed by a *femme covert*, not as agent for her husband, and not for her separate property, as known to the law, and is not obligatory upon respondents or appellant. It must be mutual, or not binding on either. The consideration and inducement for signing the paper was quiet enjoyment of the premises by White, and the

surrender of his notes; which consideration has not been fulfilled, nor any tender or offer made to fulfill the same.

III. Even if the writing be construed as a valid lease between plaintiffs and defendant, still it terminated on the first of March, 1865; and, without any objection on the part of plaintiffs, defendant continued to hold the premises until after the middle of May following, planted his crops and prepared for the ensuing year, all of which created a tenancy from year to year, which could only be terminated at the end of the year, on three months' previous notice. (4 Kent's Com. 111; 4 Wend. 327; 3 Hill, 547; 16 Mo. 162; 31 Mo. 13; 26 Mo. 216, 256, 581; 13 Wend. 479; 1 Cruise, chap. 9, p. 251.)

*Lackland & Martin*, for respondents.

I. Instruction No. 1 was properly refused. Defendant knew at the time of the execution of the lease that the lessor was a *femme covert*. He, contracting with her as such, signed the lease, and the law will not permit him to say that the same is not binding on him. The tract of land in question is the property of Mrs. Grant, conveyed to her by her father. It is her separate property, and in respect to it she is regarded as a *femme sole*. (*Coats v. Robinson*, 10 Mo. 757.)

II. Instruction No. 3 was properly refused, because there was no evidence to show that there was either an express or implied consent to hold over. The lease expired on the first day of March, A. D. 1865, and it was the duty of the defendant to surrender the premises at the expiration of the lease. The doctrine of actual possession for three years contained in this instruction does not apply to the present case. White held these premises under a lease, paid rent under said lease, and when his time expired he became an unlawful detainer. His "uninterrupted possession" was by and with the consent of plaintiffs. The law of this case was fairly and clearly laid down by the court in the instructions given for both defendant and plaintiffs, and the refusal of the instructions complained of by the defendant could not alter the verdict of the jury

WAGNER, Judge, delivered the opinion of the court

Plaintiffs brought their action before a justice of the peace, under the provisions of the statute for an unlawful detainer, and on a trial the jury found a verdict for the defendant. On an appeal to the Circuit Court, the judgment of the justice was reversed and judgment rendered for the plaintiffs. The record shows that defendant purchased the land in controversy, about seven years previous to the trial, and took possession of the same, and has continued in possession ever since. He gave a mortgage on the land to secure the deferred payments, which mortgage was foreclosed and the land sold and finally deeded to Julia B. Grant, one of the plaintiffs. After the land was conveyed to Mrs. Grant, by an instrument in writing she leased the same to defendant for a period of two years. The lease bears date on the 13th day of July, 1863; is signed by both the parties; and provides that defendant shall have the premises from the first day of March, 1863, till the first day of March, 1865, at which time he agreed to give up the possession, unless further arrangements should be made between the parties in writing. The defendant paid part of the rent, but refused to pay the remainder. No arrangement was ever made for a continuation of the lease. Defendant did not give up the possession at the expiration of his lease, but continued in the occupation of the premises till the succeeding May, when the agent of the plaintiffs demanded the same from him, and, upon his refusal to comply, instituted proceedings to recover possession.

For the plaintiffs, the court instructed the jury that if they believed from the evidence that the defendant, White, executed, with Julia B. Grant, the instrument of writing given in evidence, he thereby became the tenant of said Julia B. Grant, in respect to the premises described in said instrument of writing, for the term expressed therein, and if, after the expiration of said term, he willfully withheld the possession thereof from the said Julia B. Grant, after due demand of the same in writing, he thereby became an unlawful detainer of said premises.

The defendant asked the court to give the following instruc-



tions: 1. That the pretended contract of lease, in 1863, signed alone by Mrs Julia B. Grant and defendant, is not binding on defendant or plaintiffs, she being a *femme covert* at the time. 3. That if defendant held over after the termination of the pretended lease by either express or implied consent of plaintiffs, defendant became a tenant from year to year, and could not be dispossessed without notice to quit, and at the end of the next year. That unless the plaintiffs, or those under whom they claim, were in actual possession three years before the commencement of the suit, they cannot recover for forcible detainer.

Both of which instructions were refused by the court. The other instructions asked by defendant require no notice. By chap. 187, § 3, Gen. Stat. 1865, p. 730, it is provided that when any person shall willfully, and without force, hold over any lands, tenements, or other possessions, after the termination of the time for which they were demised or let to him or the person under whom he claims, or when any person wrongfully and without force, by disseizin, shall obtain and continue in possession of any lands, tenements, or other possessions, and after demand made in writing for the deliverance of the possession thereof, by the person having the legal right to such possession, his agent or attorney, shall refuse or neglect to quit such possession, such person shall be deemed guilty of an unlawful detainer.

The statute further provides that no notice to quit shall be necessary from or to a tenant whose term is to end at a certain time, or when by special agreement notice is dispensed with. (Chap. 189, § 14.) Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period for its termination, and in either case is construed to be a tenancy from year to year. (*Finney et al. v. City of St. Louis*, 39 Mo. 177, and authorities cited.) But where a tenant whose lease has expired is permitted to continue in possession pending a treaty for a further lease, or where there is no express or implied consent, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice. (*Jackson v. Miller*, 7 Cow. 747; *Jackson v. Moncrief*, 5 Wend.

26.) Whether a possession is continued under an express or implied assent, is a question of fact. Circumstances may be sufficient to authorize a jury to infer an acquiescence on the part of the landlord in the tenant holding over.

The first clause of the third instruction prayed for by the defendant asserted a correct proposition of law, and would have been entirely proper had it not been rendered unnecessary by the one given in behalf of the plaintiff. That instruction declared that if, after the expiration of the term, the defendant willfully withheld the possession of the premises, he was guilty of an unlawful detainer.

The statute gives the remedy where the detainer is willful, and, if the jury find such to be the fact, the case for the plaintiff is sustained. If the holding over is willful, it cannot be with consent either express or implied. Moreover, by the stipulations of the lease, the term was to end at a certain time, unless it was continued by some agreement, evidenced by writing; and it is not contended that any such agreement was ever attempted to be made.

The next question involves a consideration of defendant's first instruction, that the lease executed by Mrs. Grant was not binding on either party because she was a *femme covert* at the time. Although the property belonged to her, in her sole individual right, it is undeniably true that her husband was seized with her in the possession, and she must be held to be acting as his agent. A man may delegate an agency to his wife as well as to any other person, or he may ratify her acts as agent, although done without previous authorization. An agent may make a contract in his own name, whether he describes himself as agent or not, and his principal will be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent and it is intended by both parties that no resort shall in any event be had by or against the principal upon it. (Story on Agency, § 160, *a*; Higgins v. Senior, 8 Mees. & Welsb. 834, 845.)

The defendant voluntarily entered into the contract, went into possession under it, peaceably occupied the premises according to its terms, and on the plainest principles of justice is estopped

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from disputing its validity. (Whalen v. White, 25 N. Y. 462; Bailey v. Kilburn, 10 Met. 176, 223; Hodges v. Shields, 18 B. Mon. 828; Jackson v. Hinman, 10 Johns. 292; Ingraham v. Baldwin, 5 Seld. 45.)

The provisions of the 27th section of the act, which declare that the chapter shall not extend to any person who has had the uninterrupted occupation or been in quiet possession of any lands or tenements for the space of three whole years together, immediately preceding the filing of the complaint, cannot be made applicable to the present case. The agreement made between the parties, and the execution of the lease by the defendant, constituted a valid attornment, and from that time the lessee held his possession under the lessors.

The other judges concurring, the judgment will be affirmed.

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MORRIS PAWLEY AND HETTY L. PAWLEY, Respondents, v. JOHN C. VOGEL, Appellant.

1. *Executions — Property exempt from — Marriage Settlements — Construction of Statute.*—The provisions of the act exempting additional property from execution (R. C. 1855, p. 754, § 1) do not affect the right of the husband to receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.
2. *Husband and Wife — Marriage Settlements — How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.

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3. *Husband and Wife—Voluntary Settlements—Creditors.*—As between the parties themselves, a voluntary settlement upon the wife may be upheld in equity. And where the husband is not indebted at the time of making it, such settlement cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view of being indebted at a future time, it will be void as against creditors prior and subsequent.
4. *Practice—Replevin—Trusts not recognized by action of.*—In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or of the equities of the wife.
5. *Husband and Wife—Wife's Trust Estate—What Proceedings to protect against Husband's Creditors.*—If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.

*Appeal from St. Louis Circuit Court.*

On the 10th day of January, 1862, Joshua Owens obtained a judgment against Morris Pawley, one of the plaintiffs in this suit, upon a note for \$360.53, and on the 10th day of November, 1865, levied an execution upon certain household furniture, as belonging to said Pawley, to satisfy the judgment. This action was brought by plaintiffs to recover the furniture, as being the separate property of Hetty L. Pawley. The evidence in the case, among other things, showed a lease made on the first day of February, 1859, by Henry Shaw to Morris Pawley, of a certain lot on Grand avenue, for thirty-three years, with the privilege of renewal thereafter for ten years. This lease contained a clause that said leasehold premises should be held "for the sole and separate use of Hetty L. Pawley, wife of Morris Pawley, separate and apart from her said husband, and not subject to any debts or liabilities of her said husband." On the 2d day of January, 1860, Shaw loaned Pawley \$3,500, for which he took the joint notes of Pawley and his wife, payable at ten years from date, and secured by deed of trust on the leased premises, executed by them jointly. On the 20th day of August, 1864, Pawley effected another loan of \$3,000 from Shaw, secured in like manner. From the money last borrowed he purchased the above-mentioned furniture, as trustee of his wife. The remaining facts necessary

to an understanding of this case will be found in the opinion of the court.

Defendant, on the trial, asked the following, among other instructions, which were refused:

1. If the jury believe from the evidence that Hetty L. Pawley and her husband, Morris Pawley, fraudulently claim and pretend the property in question to be the separate property of Hetty L. Pawley, for the purpose and intent of cheating, hindering, and delaying the creditors of Morris Pawley; or that said property was acquired with money borrowed by them, or either of them, at any time during their marriage, or with money made by their joint labor, speculation, or enterprise, or the labor, speculation, or enterprise of either of them, or out of money received by said Hetty L. Pawley through inheritance from her parents or otherwise, at any time prior to the date of the note given in evidence by defendant for which the judgment was rendered on which the execution was issued—then, in either of the cases above mentioned, said property could be lawfully seized to satisfy said execution, and so the jury should find.

2. If the jury believe from the evidence that Hetty L. Pawley, wife of Morris Pawley, leased a lot on Grand avenue, from Henry Shaw, subsequent to her marriage with said Morris, and while said Morris was in embarrassed circumstances, and subsequently borrowed money on the same and used said money or any part thereof to purchase the personal property in question; or that said personal property was purchased by said Hetty L. with money received of said Morris Pawley at any time or from any one else prior to the date of the note given in evidence by defendant; and that said Vogel was, at the time of the seizure of said property, sheriff of St. Louis county, and that he took the same to satisfy the execution read in evidence—then they must find for the defendant, and assess the value of said property, and also the damages for its taking and detention, as directed in instruction No. 1.

3. If the jury believe that the money or any part of the money used in purchasing the property in question was borrowed of Henry Shaw, on the joint note of Pawley and wife, or that any



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of it was earned by Pawley, the husband, and used in the purchase or payment of the interest on the notes thus given to Shaw for the purchase money, and that said Morris Pawley was at the time indebted to the plaintiff in the execution read in evidence for the causes of action on which they were issued, or that the notes or either of them read in evidence were executed by said Pawley, then said property was subject to be taken to satisfy the same; and in that case it makes no difference whether said Pawley was an accommodation maker or not.

4. If the jury find that the property in question was purchased with money borrowed on the joint note of Pawley and wife, given to Henry Shaw, and that the same was seized by Vogel, while sheriff, to satisfy the execution read in evidence, then they must find for the defendant.

*Cline, Jamison & Day*, for appellant.

This case involves a construction of the first section of the statute of 1855, usually known as "the married women's act." (R. C. 1855, p. 754.)

I. As this statute is in derogation of the common law, it should receive a strict construction at the hands of courts. It clearly was intended to protect only such property of the wife as she might own at the time of her marriage, and such property as she might acquire after her marriage and subsequent to the date when her husband contracted the debt, and by a mere lucrative title, and not such as might come to her during coverture from her husband, or by the onerous title of purchase. The fruits of her labor, skill, and speculations, by virtue of the marriage contract, and all acquisitions made by the husband and wife during coverture, belong to the husband, and are liable to be sold to pay his debts. (*Phelps v. Tappan*, 18 Mo. 394; *Walker v. Walker*, 25 Mo. 375; *Hockaday v. Sallee*, 26 Mo. 219; *Bernayer v. Slevin*, 4 Am. L. R. 559; *Hollowel et al. v. Horter*, 35 Penn. St. 378; *Robinson & Co. v. Wallace*, 39 Penn. St. 132; *Hoffman v. Town*, 49 Penn. St. 231.) There was no evidence even tending to show that either the lease, the money borrowed, or the furniture in controversy, was the separate estate of Hetty L. Pawley, the wife

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of her insolvent co-plaintiff, or that she had ever acquired any or either of them in any way recognized by law wherein a married woman could acquire property as against her husband's creditors. (*Morell v. Smith*, 37 Me. 394; *Woodson v. Pool*, 19 Mo. 340; *Frissell v. Rosier*, 19 Mo. 448.)

The consideration for the lease taken from Shaw was the covenants of Morris Pawley. His wife was not bound, nor could she bind herself. There is no covenant in the indenture that purports to be the covenant of the wife. The entire consideration springs from the husband; and the statute of fraudulent conveyances, as a matter of law, executes the use with the legal title in the husband, in favor of his creditors both prior and subsequent. The lease was, on the day of this levy, liable to be sold under execution, and the purchaser would have taken an absolute title against both husband and wife, as a matter of law, arising on the face of the deed, irrespective of the intention of Pawley to defraud. The most favorable view which it is possible to take of this case is to regard these transactions as a post-nuptial settlement by an insolvent debtor upon his volunteer wife. This, it seems, the court below supposed could be done; but upon what principle of law, they seem to have been unable to explain. In this view of the case, the only pretense by which the claim of Mrs. Pawley can be upheld is, that the settlement was for a valuable consideration; and, as none is pretended, her claim as against the defendant is void, as a sheer matter of law, and so the court should have instructed the jury. The law imputes bad faith when the direct effect of the transaction is to defraud. And such being the effect in this case, the second section of our statute of fraudulent conveyances defeats the claim of plaintiffs to the property in question. (*Woodson v. Pool et al.*, 19 Mo. 340; *Read v. Livingston*, 3 Johns. Ch. R. 491; *Miller v. Thompson*, 3 Port. 196; *O'Donnell v. Crawford*, 4 Dev. 197; *Bogard v. Gardley*, 4 Sm. & M. 302; *Barbee v. Wimer*, 27 Mo. 140.)

The personal property in controversy is claimed to have been purchased by money borrowed on the joint note of husband and wife, and was in possession of the husband at the time of levy. In what light can it be claimed to be the separate property of the

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wife, or to be held by the husband as trustee of the wife? No such use is dedicated by deed duly recorded, as required by law. The wife neither purchased nor paid for it, nor is she liable to an action on the notes which they claim to have been given for the money out of which it was paid for. The husband alone is liable upon them; and in law both the title and the possession were in the husband at the time of the levy. Now, after the levy is made, he comes forward and claims to hold the personal property as trustee of his wife on a verbal dedication of use in her favor. Independent of all considerations we have urged against the claim of the wife to this property, this would be void under the fourth and fifth sections of our act concerning fraudulent conveyances. (*Layson v. Rogers*, 24 Mo. 192; *Barbee v. Wimer*, 27 Mo. 140.) A gift of a chattel by the husband to the wife, without consideration, is void. (*Woodson v. Pool*, 19 Mo. 340.) It has been contended by the counsel for Pawley and wife that the words in the statute under consideration embrace property situated as is the property in controversy, and that the word "otherwise" should be construed to mean every species of conveyance that can be made of personal or real property. The true rule of construction, when applied to this statute, cannot enlarge its meaning to embrace any conveyances of property except those which could be lawfully made to a married woman. And in the State of Maine, where the statute permitted the wife to become the owner of property "purchased," etc., by her, its intent was held not to include property purchased by her earnings, as they belonged to her husband. (*Morell v. Smith*, 37 Me. 394.)

One of the first canons of construction is, that when general terms are added to words of particular description they do not enlarge the modes or subjects embraced in the particular words. (*United States v. Wise*, 2 Wallace, Jr. 72.) How can any one contend that the words of this statute embraced modes of conveyance that were at that time and have always been pronounced void? The words of the act do not purport to make any act or thing done by the wife or any one else a conveyance binding in law that was not so before. It does not purport to enlarge the means whereby a married woman can acquire property, but only

attempts to exempt such property as she may lawfully acquire from levy and sale. Could Mrs. Pawley lawfully become the volunteer owner of the use of leasehold premises dedicated to her by her insolvent husband, and declared by him to be held to his wife's use as against the whole world, and especially his own creditors? This is a bold-faced fraud, and in terms shows its purposes to be prohibited by the second section of our statute of fraudulent conveyances—made and expressed to be for the purpose of placing it above the reach of his creditors prior as well as future. (*Potter v. McDowell*, 31 Mo. 62.) This was apparent upon the face of the lease, and the court should have so stated to the jury. (*Bigelow v. Stringer*, 40 Mo. 195.)

If the court regards the leasehold as a settlement by the husband upon his wife as a mere volunteer, and the husband as the legal owner and the settler of the use, then how could the wife enforce any rights under the lease, in a court of chancery, against her husband? It could not lend its aid in favor of a volunteer against a settler, where the legal title remains in him. She could not call him to account, nor divest him of legal title. (*Ellison v. Ellison*, 6 Vesey, 656.) If the party be not indebted at the time of a voluntary settlement, and have no fraudulent design, it would be held good as to subsequent creditors. But if the party, as in this instance, be insolvent at the time of a voluntary settlement, then such settlement is void, as a matter of law, both as to prior and subsequent creditors; and this is the universal doctrine of every enlightened court, of this country as well as that of England. (*Ath. Marriage Set.* pp. 149, 230, 237, 212; *Read v. Livingston*, 3 Johns. Ch. R. 481; *Townshend v. Wendham*, 2 Ves. 1; *Fitzer v. Fitzer*, 2 Atk. 511.)

*Strong*, for respondents.

I. The statute exempting additional property from execution (*R. C. 1855*, p. 754, § 1) not only exempts the property acquired by the wife, but also the uses and profits thereof. It was clearly the intention of the Legislature to protect all her property, and all the fruits and increase of it. Of what use would the largest landed estate be to a married woman, if, the moment it became

productive and yielded a money income, that money or anything purchased with it was to be subject to the payment of her husband's debts? With a property worth a million, she might suffer for the necessities of life through the folly or imprudence of a reckless or unfortunate husband. If money or personal property cannot be secured to a married woman under the provisions of this act, its benefits are imaginary rather than real.

The attempt is made by defendant to liken this to a case of post-nuptial settlement. The only pretense for holding that it is property settled on his wife by Pawley is, that as her trustee he signed the lease which contained covenants for the payment of rent. It is a well-settled principle that a husband not only may be the trustee of his wife, to hold property for her separate use, but that the law will, in the absence of a regular trustee, make him her trustee, or charge him as a trustee, and compel him to execute the trust in certain cases. (2 Story on Eq. Jur. § 1380.) In the management of a trust estate it often becomes necessary for a trustee to enter into contracts for the benefit of the estate which would create a personal liability on his part. But he has the trust property for his protection, and cannot be compelled to incur liability beyond the indemnity secured by that property. He may be considered a security on the contract for the benefit of the trust property; and that property will be subjected to the burden of discharging the contract or reimbursing the trustee. If this were not so, a married woman having a separate estate in the hands of a trustee could never enjoy the benefit of any contract respecting it. She could make no contract touching it (except, perhaps, to charge it with the payment of her debts), because of her coverture, and because the legal title is in her husband; and if he cannot contract respecting it, without having the property treated and become liable as his own, she loses some of the principal advantages of having a trustee.

While it is true that Pawley signed this lease containing these covenants, and also the notes and deeds of trust, this was required out of abundant caution to avoid any trouble or questions in case of foreclosing the deeds of trust, and not because Mr. Pawley's credit or his personal responsibility formed in fact any



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part of the consideration of the lease or of the loans. Any presumption of such facts, arising upon the face of the papers, is abundantly rebutted by the proof that he had no credit or pecuniary responsibility whatever. Mr. Shaw states explicitly that he made these loans to Mrs. Pawley on the faith of the security of the leased premises and the improvements thereon. It was a proper subject of inquiry whether Pawley had in fact discharged these covenants entered into in the lease with his own means; and if he had, it would have furnished matter for the jury to consider whether this was a *bona fide* transaction or a fraudulent device. This they were directed to consider in the instruction given by the court. This is not a voluntary settlement by Pawley. He had no interest in the lease, by its terms, because it was made to the sole use of the wife. He had no interest in it by putting his money into it, for he had none to put in, and the proof clearly shows he put none in. The verdict of the jury, on the question of fraud, settles this point. The case of *White v. Dorris and Wife*, 35 Mo. 181, settles nearly every point in this case.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff and his wife bring this suit upon a claim for the delivery of personal property, of which it was alleged that the wife was entitled to the possession against the sheriff, who had levied upon and seized the property under execution upon a judgment against the husband. The answer denied that the plaintiffs were entitled to the possession, and set up the further defense that the claim of the wife was fraudulent and void as against her husband's creditors. This matter was involved in the issues already made under the denial of the allegations of the petition.

It appeared in evidence on the trial that the plaintiff, Morris Pawley, in 1859, being largely indebted and insolvent, took a lease from Henry Shaw of a lot of ground on Grand avenue, for a long term of years, upon rents reserved, which was expressed to be made to him as trustee to the sole and separate use of his wife; that the wife, and himself as trustee, in 1860, borrowed money of the lessor, and gave their notes and a deed of trust on the leasehold property to secure the payment thereof; and afterward, in

1864, made another loan from the lessor, in the same way; and, with the moneys so obtained, together with a small sum which she had earned, and another sum which she had received as a gift from her father, erected and furnished a house on the leased lot, in which they lived; that the leasehold and house were afterward sold at a large advance on the cost, and the balance, after paying the loans, rents, and interest, was invested in the Missouri Iron Works, in the husband's name as trustee for his wife, being himself the superintendent of the works, and having the management of the whole business from the beginning in his character of trustee. It would seem that the moneys loaned and the moneys which had come into the hands of the wife, and the fruits of their joint industry during the whole period of these transactions, went into the funds of the trust so created. It appeared that the furniture in question in this suit was purchased out of the moneys borrowed, and not out of the money which the wife had received from her own earnings, or from her father, and the property was found by the sheriff in their residence.

Without going more minutely into the details of the transaction, we are constrained to say that the whole evidence showed a state of case which could scarcely be considered otherwise than as a plain scheme of fraud upon the rights of creditors prior and subsequent. The court below (as well as the parties) appears to have proceeded upon a strange misconception of the principles of law which ought to govern such a case. It is, perhaps, not surprising that an insolvent man, laboring under the burden of debt, should be induced to resort to ingenious contrivances, in contravention of law, in his efforts, laudable when fair and honest, to raise himself above the condition of a proletary and to provide suitably for his family. But the laws cannot be perverted to the purpose of defrauding creditors of their just rights. Nor is it credible that, in any country, laws could ever be made with the express design of giving a legal sanction to positive fraud.

No authorities are produced in support of the plaintiffs' case. Reference is made to the act of March 5, 1849, which is continued in the revision of 1855, exempting additional property from execution, as having some bearing upon the matter. (R. C.

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1855, p. 754, § 1.) This statute has been the subject of comment in this court in several cases. In *Phelps v. Tappan*, 18 Mo. 393, it received a construction as to its general object and intention, and it was said that the act seems to have been suggested by some provisions of the Spanish law which once prevailed here, and that the Legislature could have contemplated only property acquired by a lucrative title—that is, by the gratuitous gift of another; and not property acquired by an onerous title—that is, by purchase for a consideration paid, or by the fruits of the joint industry of the husband and wife. In *White v. Dorris*, 35 Mo. 187, it was held that the statute merely made additions to the kinds of property which were previously exempted from levy and sale under executions, and, as it was admitted that there was no fraud and no resulting trust, the property in question was held to be exempt from sale under execution against the husband. It does not affect the right of the husband to receive and dispose of such property of the wife. (*Boyce v. Cayce*, 17 Mo. 47.) It does not exempt the property from the indebtedness of the husband created after the reception of such property by the wife. (*Cunningham v. Gray*, 20 Mo. 170.) It does not certainly appear whether the money received by the wife from her father was put into the general fund before or after the creation of the debt in question; but this was immaterial. It was distinctly proved that the property levied upon by the sheriff was purchased with the money borrowed in 1864. In the view we must take of the matter, this statute had no application to the case made.

This lease was not properly to be considered as a settlement of money or property in trust for the sole and separate use of the wife at all, within the doctrines of equity on this subject. Such was not the real nature of the transaction. These doctrines relate to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage and expressly settled to her sole and separate use by the creation of a trust for that purpose. This lessor did not propose to make a gift of anything. A voluntary gift or settlement by the husband on his wife, while indebtedness exists, or in contemplation of future indebtedness, will be fraudulent and void as against his

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creditors. In the view of a court of equity, the wife may contract and incur liabilities in reference to such separate property when once settled upon her, and may dispose of it as a *femme sole*; but such separate estate is unknown to a court of law. She may pledge and bind that property, but none other; her general disability at law continues as before; but a court of equity may proceed *in rem* against that property, though not *in personam* against herself, and subject it to the payment of her separate debts. (Adams' Eq. 43-45; 2 Story Eq. Jur. § 1397.)

It is plain that the wife had no money settled to her separate use, and with which she could deal in this manner, before this lease was taken. The leasehold was the equivalent of the rent. The rents must have been paid by the husband, or with the fruits of their joint industry. The rents were really to be paid by the husband, and he only was bound by the covenants of the lease. The wife's money in his hands was his own money. In law, husband and wife are one person. Where a wife has money settled to her separate use, or has property of her own under an agreement with her husband upon a valuable consideration made before or after marriage, with trustees, in a proper instrument executed for her benefit and to the effect that she may carry on a separate trade on her sole account, in the name of her trustees, such an agreement may be protected at law and may be enforced in equity for his benefit against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. (2 Story Eq. Jur. §§ 1385-6.)

But that these familiar and well-settled principles appear to have been overlooked, or wholly disregarded, it would seem that it should be unnecessary to repeat them. Here was really no such case of a separate trade being carried on by the wife with her separate estate in this manner; there was no agreement between them of that nature; but, in truth, the husband was carrying on his own trade with his own money, or with moneys that were donated by himself in the name and under the cover of being his wife's trustee, for their common advantage, and in direct and plain fraud of the rights of creditors. This is a thing which neither law nor equity can allow to be done.

From the evidence it clearly appears that all the moneys that went into this leasehold estate, or into the iron business, or into the property levied on, were funds belonging in law to the husband, or placed at his disposal, or were the fruit of the joint industry of the husband and wife under the arrangement, which was voluntary merely. It may be conceded that as fast as money was acquired or value was created, after the lease was taken, it was allowed by the husband to go into this trust for the benefit of the wife. As between the parties themselves, such a voluntary settlement may be good. We do not say that a court of equity would not uphold such a trust and settlement for her benefit against him; but as between him and his creditors prior and subsequent, being attended with badges of fraud, it can be regarded in no other light than as a continuous scheme of fraud upon them. A voluntary settlement in favor of the wife by a husband who is not indebted at the time, cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view to being indebted at a future time, it will be void as against creditors prior and subsequent. (*Sexton v. Wheaton*, 8 Wheat. 229.) And if it be a grant by the husband of his whole estate to the wife, it will be inoperative both at law and equity. (2 Story Eq. Jur. §§ 1374-5.)

The husband and wife are joined as plaintiffs. The suit is an action at law, and not a proceeding in equity. The petition alleges that the wife is entitled to the possession of the property. If that were true, her possession was his possession at law, and there was no reason for joining her. He was himself the owner of the legal title and had possession. A court of law could take no cognizance of the trust or of the equity of the wife in such an action. The defense of the sheriff on the evidence was completely made out; and the claim of the plaintiff, to recover this property from him in this suit, was a solecism in law. If the trust could be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would have been a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction to restrain a sale of the property



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under a judgment at law against him. We are of the opinion, therefore, that the defendant's instruction, to the effect that on the evidence the plaintiff was not entitled to recover, should have been given.

It will be sufficiently apparent from the principles enunciated herein that the court below erred both in giving and refusing instructions, and it is not deemed necessary to discuss them more in detail.

The judgment will be reversed and the cause remanded. The other judges concur.

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SIMON OBERMAYER *et al.*, Respondents, v. DAVID N. GREENLEAF and SARAH E. GREENLEAF, Appellants.

1. *Husband and Wife—Joinder of Parties—Ante-Nuptial Settlements—Debts of Wife contracted prior to Marriage—Liability of Husband for.*—The right of a creditor to a judgment against both husband and wife for the debt of the latter cannot be destroyed by virtue of a contract between them that each should have the exclusive ownership and control of their own property, and that the separate property of each should be exempted from liability for the debts of the other contracted previous to the marriage.

*Rankin & Hayden*, for appellants.

I. The contract of defendants, solemnly made in anticipation of marriage, and published by the parties to it, and brought home to the defendants, operated in equity to relieve the husband from the wife's debts contracted *dum sola*, and made the wife and her property the sources to which chancery will compel the creditors of the wife *dum sola* to resort. The principle of equity is that where a debt is created with reference to or on the faith of a particular property, that property shall be followed for the payment of the debt; and where there is an express published agreement between the parties that the estate and property of the husband shall not be liable for the wife's debts *dum sola*, but that she shall retain exclusive right over her own property during the mar-

riage, thus carrying out by contract the principle of equity and making her own property liable during coverture for those debts which she had contracted *dum sola*, the English courts have declared that equity will compel the creditors to resort to the wife's separate property. (Reeves' Dom. Rel. p. 53; Freeman v. Goodland, Ch. R. 295; Powell v. Bell, Abridg. of Cas. in Eq. 16; Prac. in Ch. 256.)

A marriage contract like the present has the effect in equity of altering the ordinary obligations. But it is perfectly competent for the parties by express contract to alter the ordinary obligations arising from marriage. If the liability of the husband arises from the contract of marriage, how can it arise or exist when there is an express stipulation in that contract to the contrary? Will it be said that the liability of the husband is a legal consequence of marriage, and that the parties by express contract can not do away with that legal consequence? But why may not this be done? Is the stipulation that the wife's own property, not the husband's, shall be liable, immoral or against public policy? If it be said that it is contrary to an express doctrine of the common law, is it not contrary thereto that the wife should hold real and personal property of her own, without the intervention of a trustee even; that she should sell to and purchase of her husband without a trustee; should, in short, be a *femme sole*—not merely *sub modo*, but, as courts of equity have declared her, absolutely a *femme sole*—in respect to her separate property, where she is not specially restrained by the instrument under which she acts? It is now the established doctrine that a *femme covert* may contract and bind her separate estate, and that her separate estate is chargeable with debts contracted on the faith of it, and that she may contract a debt directly to her husband. Are not these direct infringements of the rules of common law, and do not they require courts of equity to go quite as far as this court is asked to go here? (Methodist Church v. Jacques, 17 Johns. 548, reviewing Chancellor Kent's decision in 3 Johns. Ch. 77; North Am. Coal Co. v. Dyett, 7 Paige, 15; 22 Wend. 528; 4 Sim. 82; 1 Craig & Phil. 48; 15 Ves. 596; Overall v. Ellis, 38 Mo. 209; Strong v. Skinner, 4 Barb. 546.)

*Ewing & Holliday*, for respondents.

I. As the law by marriage gives to the husband all his wife's personal estate, it makes him liable for his wife's debts owing at the period of marriage. (Bright's Husband and Wife, vol. 2, pp. 1, 2, § 1.) This is true although the wife has not one dollar of personalty at the time of the marriage. (Reeves' Dom. Rel. 49 *et seq.*, 53.) The husband's liability does not depend on the fact that he received property of her.

II. If the defense set up in this case should be allowed, the plaintiffs would be deprived of their rights forever, and could never recover their debt, even though the wife should, with her husband, make thousands of dollars per year. The plaintiff can not sue the wife and get a personal judgment against her. If she should acquire separate property now, it could not be said that this note sued on was a charge against that. Plaintiff could only recover in equity by showing that the wife had property at the time of the marriage liable to this debt, which by the marriage agreement was left still liable therefor.

III. Even under our law of 1849, the most favorable to the defendants that was ever adopted in this State, a general judgment could be entered against the defendant Greenleaf in this suit, and plaintiffs could seize and levy upon any property acquired after marriage, because "the presumption is that it is the fruit of the joint industry of the husband and wife, and is consequently liable for the debts of the wife contracted before marriage. (Phelps v. Tappan, 18 Mo. 393.)

IV. The marriage contract is of no effect so far as creditors of the wife before marriage are concerned. The law makes the husband responsible for the debts of the wife contracted before marriage, from the fact that the law gives him the personal property held by her at the time of marriage, merges her existence in his during marriage, and gives him the control of all her joint acquisitions. In this marriage contract the parties attempted to annul and set aside these positive provisions of law without the consent of the creditors — the only parties who could possibly suffer injustice from such a contract. The law will not permit their rights to be thus defeated by a woman contemplating marriage.

FAGG, Judge, delivered the opinion of the court.

The appellants were sued upon a promissory note executed by the wife previous to their intermarriage. The answer admits all the allegations of the petition, but sets up as a defense an antenuptial agreement by which it was stipulated, among other things, that each party should have the exclusive ownership and control of their own property, and that said separate property of each should be exempted from liability for the debts of the other contracted previous to the marriage. A demurrer to so much of the answer as embraced this matter was sustained, and judgment rendered for the amount of the debt and interest. The common law liability of the husband, during the existence of the coverture, for the debts of the wife contracted previous to the marriage, has not been changed by our statutes. Any provisions that may exist for the protection of the property of either husband or wife from levy and sale for the debts of the other cannot affect the question presented by the record in this case. The right of the creditors to a judgment against both cannot be destroyed by virtue of any contract between the parties themselves in reference to their property. To hold differently would be to recognize the power of two individuals in contemplation of marriage to change the established law of the land simply by such an agreement. Certainly this cannot be done. This agreement constituted no defense to the action, and the respondents were entitled to their judgment.

It does not appear from the allegations of the answer that the wife, in point of fact, had any separate property whatever out of which this debt could have been satisfied. But whether such an averment would be necessary in order to make the principles of equity, as claimed by appellants' counsel, applicable, is not material to the determination of this cause. The question as to what property is liable to be taken in satisfaction of this judgment will more properly arise when the respondents shall proceed to enforce it by an execution.

The demurrer was properly sustained, and the judgment of the Circuit Court must be affirmed. The other judges concur.

THE WASHINGTON UNIVERSITY, Defendant in Error, v. EDWARD S. ROWSE, Collector of the Revenue of St. Louis County, Plaintiff in Error.

1. *Laws exempting Lands from Taxation — Their effect.* — An act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent Legislature.
2. *Legislature — What laws irrevocable; what not — U. S. Constitution — Construction.* — Each Legislature is alike invested with the general powers of sovereignty. Therefore one cannot pass a law irrevocable or irrepealable in its character unless it has imparted to it something in the nature of a compact or contract which will preserve it inviolate under the inhibition of the national constitution.
3. *Taxation — Laws depriving Legislature of power of; how construed.* — A law which seeks to deprive the Legislature of the power of taxation must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding. Every presumption will be made against its surrender, as the power was committed by the people to be exercised, and not alienated.
4. *Corporations — Laws exempting from taxation — Their effect.* — The Legislature may, if there is no prohibition in the organic law to the contrary, exempt a corporation from taxation, but such exemption is in its nature *durante, bene placito*, and revocable by a subsequent act.
5. *Right of Taxation — Incident of popular sovereignty — Implied powers.* — In a representative democracy, the right of taxing the citizen is an inseparable incident of popular sovereignty, and must be preserved unimpaired in order that the revenue and burdens necessary to support the government be not unequally distributed, or onerously imposed on any particular class. It is a branch of the legislative power which always, in its nature, implies not only the power of making laws, but of altering and repealing them, as the exigencies of the State and circumstances of the times may require.

*Appeal from St. Louis Circuit Court.*

Plaintiff's charter (Adj. Sess. Acts 1853, p. 290) was substantially as follows: "Be it enacted," etc.: "1. Christopher Rhodes," etc., "and their associates and successors, are hereby constituted a body corporate and politic, by the name of The Eliot Seminary, and by that name shall have perpetual succession, and be capable of taking and holding, by gift, grant, devise, or otherwise, and conveying, leasing, and otherwise disposing of, any estate, real, personal, or mixed, annuities, endow-



ments, franchises, and other hereditaments which may conduce to the support of said seminary or to the promotion of its objects. All property of said corporation shall be exempt from taxation; and the sixth, seventh, and eighth sections of the first article of the act concerning corporations, approved March 19, 1845, shall not apply to this corporation. 2. The management of the affairs of this corporation shall be vested in a board of seventeen directors. The persons herein named shall constitute the first board of directors. Vacancies occurring in the board by resignation, death, or otherwise, shall be filled by the board. 3. The board of directors shall prescribe the course of instruction in said seminary, and organize the institution under such regulations and provide in such way as they may deem proper for the appointment of its professors, teachers, and other officers, and may make such by-laws and rules as they may deem necessary for the management of the institution."

Plaintiff's charter was amended by an act approved February 12, 1857 (Adj. Sess. Acts 1857, p. 610), which altered the name of the institution to that of The Washington University, and provided, in the second section thereof, as follows: "2. No instruction, either sectarian in religion, or party in politics, shall be allowed in any department of said university; and no sectarian or party test shall be allowed in the election of professors, teachers, or other officers of said university, or in the admission of scholars thereto, or for any purpose whatever." Section 3 provided for the enforcement of the provision of section 2.

*Clover*, for plaintiff in error.

The Legislature, in 1853, attempted to exempt all property of a corporation, created by the name of the Eliot Seminary, from taxation, and expressly declared that the sixth, seventh, and eighth sections of the corporation law of March 19, 1845, should not apply to it. The corporation so created is in no manner limited as to the amount of property of any kind, real, personal, or mixed, which it may hold. Its property, now worth hundreds of thousands of dollars, may in time become swollen to millions; and the corporation claims perpetual exemption from payment of

any portion of the burdens of government, under the theory of an irrepealable contract with it on the part of the State which created it.

I. The only question in this case is, can the exemption prevail against subsequent legislation? Can the General Assembly in 1866 repeal or affect the legislation made in 1853; or, in other words, can the generations of men in political government at this day be circumscribed in their political action by the work of men of an earlier day? The following fundamental propositions are submitted: 1. All property within the limits of a State is subject to taxation. 2. The taxing power is sovereign power. 3. The act of 1855 forever exempting all property of this corporation from taxation cannot be supported. The act is without preamble, and a preamble might state a consideration. The corporation is without an object so far as the acts creating it show any. It is perpetual as to time. It is without limit as to amount of capital to be owned and possessed. There was no purpose in the creation of this corporation, unless we can infer it from the use of the words "Seminary" and "University." The exemption is claimed to be perpetual. A covenant which prevents all future taxation must be void, because every Legislature has a right to determine what property shall be taxed, without regard to what may have been done by a preceding Legislature, and without the power of binding a subsequent Legislature. (3 Pars. on Cont. 543.) The question in this case is novel; because in no other case, so far as known, has a corporation, the creature of a State government, claimed perpetual exemption from all taxation. Here the creature has become greater than the creator. The State may fall, but the corporation is to live forever under the ægis of the federal Constitution. The decisions of the Supreme Court in the cases of the Piqua Branch Bank v. Knoop, 16 How. 369; Dodge v. Woolsey, 18 How. 331, 432; Jefferson Bank v. Skelly, 1 Black, 439, do not touch the point involved.

There was an express payment of a sum of money to Ohio by the banks, or an express agreement to receive a sum of money by Ohio from the banks, which formed the consideration of the contract in these cases; and in any event the banks were of limited

existence; there was a period named for their existence, and the exemption from taxation was temporary—limited by the term of existence of the bank; and the capital was fixed so that the amount of the exemption was definitely known beforehand; all which facts and circumstances might justify the decisions of the court in the above cases, and yet make them of no bearing in the case at bar. The banks did not claim perpetual charters and perpetual immunity, as does this seminary or university.

It is one thing for a State to charter a bank for ten or twenty years, and, for a sum of money, to exempt the property of the bank from further taxation for the period of this ten or twenty years; and quite another to charter a bank forever, unlimited as to capital or time, and, without any consideration whatever or price paid (as was paid in all cases heretofore decided), to exempt all its property acquired and to be acquired by gift, grant, devise, or otherwise, whether real estate, personal estate, mixed estate, or whether annuities, endowments, franchises, or hereditaments, from any taxation. Unquestionably this court ought to decide this act nugatory; if for no other reason, because it was and is a fraud upon the body politic, perpetrated by the agent—the General Assembly—upon the constituent—the people at large. (3 Pars. on Cont. 543.)

II. In the case of this corporation no presumption ought to be made in its favor that the exemption is a perpetual one, for the language of the charter does not so declare, and it ought to be construed as a charter of exemption during the pleasure of the State, and no longer. (*Christ Church v. Philadelphia*, 24 How. 300; *Commonwealth v. Bird*, 12 Mass. side p. 442; *Dale v. Governor*, 3 Stew. 387; *Alexander v. Willington*, 2 Russ. & M. 35; 12 Harris, 232; *Lindley's Jurisp.* § 42.)

III. The acts do not make or express a contract. There was no consideration moving to the State, either pecuniary or valuable, nor does the Legislature seem ever to have contemplated the idea of a consideration to the contract. Chief Justice Marshall, in the *Dartmouth College* case, says: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this

benefit constitutes the consideration, and in many cases the sole consideration, of the grant." This is certainly only partial truth, and not whole truth. It is in one sense true that the objects for which a corporation is created are such that the government wishes to promote them, else the government would not incorporate; but that charters are granted because deemed beneficial to the State may have been true in the time of Judge Marshall, but was not true when the Eliot Seminary was chartered, and is not true now. From a consideration of the charter itself, what benefit is supposed to have accrued to the State by the act to incorporate the Eliot Seminary? A seminary of what? Whether of religion or free thought, of vice or goodness, of learning or gymnastics, does not appear. For charter of the Eliot Seminary, *vide* Sess. Acts of 1853, pp. 290-1; and for amendatory act, Sess. Acts of 1856, pp. 610-11.

*Wingate*, for plaintiff in error.

I. Under our frame of government, the power of taxation is essential to its existence, and is one of the incidents of sovereignty inherent in the people, not to be abridged by the Legislature in exclusion of its succeeding action. Neither a Legislature nor a convention of the people can extinguish an essential right of sovereignty. Another convention may declare otherwise, or another Legislature repeal the exemption. If the Legislature, without the authority of the constitution, may exempt one kind of property from taxation, it may exempt all; and if the Legislature may exempt all property from taxation beyond its future control, the government contains within its own organization the elements of its own destruction.

II. An exemption from taxation is not a contract in the sense of the constitution. A consideration, one of the necessary requirements to constitute a contract, is wanting, for nothing can compensate for the yielding of a sovereign right upon which the government must depend for existence.

III. The words of the act in question do not create a perpetual exemption from taxation, and, to give them such a construction, resort must be had to inference or presumption arising from the

language employed, which cannot be relied upon to abridge the powers of legislation touching the surrender of a sovereign right of the people. (1 New Am. Law. Reg. 718; Adj. Sess. Acts 1853, p. 49; Blackw. on Tax Tit. 478-82; Const. Mo. art 11, § 16; Gen. Stat. 1865, p. 95, §1.)

*Hitchcock*, for defendant in error.

I. The State may make a contract not to exercise the taxing power, or to exercise it only within certain limits, with respect to a particular subject; and such a contract once made cannot be rescinded by a subsequent legislative act. (*Jefferson Branch Bank v. Skelly*, 1 Black, 436, 448; *New Jersey v. Wilson*, 7 Cranch, 164.) The only qualification to the above is that such a contract by a State will not be implied, but must appear in express terms. (*Gordon v. Appeal Tax*, 3 How. 133, cited; 1 Black, 446.) But when the purpose to exempt from taxation appears in express terms in the charter, the uniform ruling of the United States Supreme Court has always been "that State legislatures, unless prohibited in terms by State constitutions, may contract by legislation to release the exercise of the power of taxing a particular thing, a corporation, or person, as that may appear in its act, and that the contrary has not been open to inquiry or argument in the Supreme Court of the United States." (Per Wayne, J., in *Jefferson Br. Bk. v. Skelly*, 1 Black, 448; *Piqua Br. St. Bk. Ohio v. Knoop*, 16 How. 369; Const. U. S. art. 1, § 10; *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 *id.* 164; *Ferrett v. Taylor*, 9 *id.* 43, 292; *Dartmouth Col. v. Woodward*, 4 Wheat. 518; *Providence Bk. v. Billings*, 4 Pet. 559; *Gordon v. Appeal Tax Ct.*, 3 How. 133; *West Riv. Br. Co. v. Dix*, 6 *id.* 531, 536, 539, 542; *Woodruff v. Trapnall*, 10 *id.* 204, 208, 214; *E. Hartford v. Hartford Br.*, 10 *id.* 535; *Ohio L. I. & T. Co. v. Debolt*, 16 How. 429; *Mech. & U. Bk. v. Debolt*, 18 *id.* 380; *Bridge Pr. v. Hoboken Co.*, 1 Wall. 116; 16 How. 387, 388; *Sturgis v. Crowninshield*, 4 Wheat. 122; *McCulloch v. Maryland*, 4 *id.* 316; *Chas. Riv. Br. v. Warren Br.*, 11 Pet. 540, 611; *Planters' Bk. v. Sharp*, 6 How. 318; *Paup. v. Drew*, 10 *id.* 218; *Balt. & S. R.R. Co. v. Nesbit*, 10 *id.* 395; *Piqua Br. St. Bk. Ohio v.*



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Knoop, 16 *id.* 388 ; Dodge v. Woolsey, 18 *id.* 331, 360 ; Jefferson Br. Bk. v. Skelly, 1 Black, 431, 446 ; The Binghampton Br., 2 Wallace, 52 ; Von Hoffman v. Quincy, 4 Wallace, 535.) Nothing in the Constitution of Missouri which was in force in 1853 and 1857 interferes even indirectly with the power of the General Assembly of Missouri to make such a contract. The only prohibition of any description whatever upon the exercise of legislative power which is contained in that Constitution is in § 26 of art. 3, R. C. 1855, vol 1, p. 69, and relates solely to the question of emancipation and to the introduction of slaves into this State.

II. An express stipulation for a release or exemption from taxation, either in whole or in part, contained in a charter of incorporation, is a contract between the State and the corporation, "within the meaning, and entitled to the protection, of the Constitution of the United States, against any law of the State impairing its obligation ;" and any legislative act which assumes the right to impose any tax in contravention of such stipulation is "unconstitutional and void." (Per Wayne, Justice Supreme Court, 1 Black, 448, citing Piqua Branch, etc. v. Knoop, 16 How. 369 ; Providence Bank v. Billings, 4 Pet. 561, as explained and commented on, 16 How. 388, 391.) A grant is an executed contract, and implies a continuing obligation on the part of the grantor to do nothing inconsistent with the enjoyment by the grantee of the thing granted, in accordance with the tenor of the grant. (Per Marshall, J., in Fletcher v. Peck, 6 Cranch, 136.) The adoption of a new State constitution makes no difference in the application of these principles. (Dodge v. Woolsey, 18 How. 331, 360 ; so per Taney, C. J., in Ohio L. I. & T. Co. v. Debolt, 16 How. 429.)

III. The exemption from taxation in plaintiff's charter is in express terms, and is contained in the original charter. The exemption is not a subsequent additional privilege conferred without consideration. The charter of the Home of the Friendless is upon a similar footing in this respect. (See charters in full ; Adj. Sess Acts 1853, p. 50, charter of Home of the Friendless ; *id.* 1853, p. 290, and *id.* 1857, p. 610, charter of Washington

University.) These corporations are both private and eleemosynary in their character. On their face appear valid considerations of great benefit to the public, which the State might well recognize and accept as sufficient and valid considerations for the exemptions. On the faith of this contract large sums of money and property have, as alleged in the bill in each case, been donated by charitable persons to each corporation. To subject this property to taxation would be to lessen its actual value to the corporation and to diminish the value of the franchise itself. This falls most directly within the construction uniformly placed by the United States Supreme Court on the constitutional prohibition against "impairing the obligation of contracts." Any contract, therefore, which proposes to do this, is simply void. (Cases above cited.)

IV. If the constitutional prohibition of any exemption from taxation (Const. Mo. 1865, art. 4, § 27; Gen. Stat. 1865, p. 32), and the act for the collection of the revenue (Gen. Stat. 1865, chaps. 12 and 13, pp. 98, 133) under which the sale is attempted, therefore are void, so far as the property of these plaintiffs is concerned, it follows that all the acts and proceedings had under them against plaintiffs or their property, no matter by whom, are simply void, and have no lawful basis or authority whatsoever. This applies equally to—1. The assessment of this property. 2. The judgment or order by the County Court. 3. The advertisement for sale by the collector. All these steps are *ab initio usque ad finem*, and equally without authority of law.

WAGNER, Judge, delivered the opinion of the court.

The question involved relates to the power of the State to assess, levy, and collect a tax on the property owned by the defendant in error. In 1853 the Legislature incorporated the Eliot Seminary, and provided that the incorporators, their associates and successors, should be constituted a body corporate and politic, by the name of The Eliot Seminary, and by that name should have perpetual succession, and be capable of taking and holding, by gift, grant, devise, or otherwise, and conveying, leasing, or otherwise disposing of, any estate, real, personal, or

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mixed, annuities, endowments, franchises, and other hereditaments which might conduce to the support of the said seminary or the promotion of its objects; that the property of the said corporation should be exempt from taxation; and that the sixth, seventh, and eighth sections of the first article of the act concerning corporations, approved March 19, 1845, should not apply to it. (Adj. Sess. Acts 1853, p. 290.)

The Legislature, by an amendatory act in 1857, changed the name of The Eliot Seminary to that of The Washington University. (Adj. Sess. Acts 1857, p. 610.)

The seventh section of the general corporation law of 1845 provided that the charter of every corporation that should be thereafter granted by the Legislature should be subject to alteration, suspension, and repeal, in the discretion of the Legislature. When the law was passed granting the charter, there was no express prohibition restraining the Legislature from exempting property from taxation; but by the present constitution it is declared that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties or to municipal corporations within this State." In pursuance of this clause of the constitution, the Legislature passed a law for the assessment and collection of the revenue, by virtue of which the property of the defendant in error was subjected to taxation. It is now insisted that the charter was an irrepealable contract, and perpetually exempted the property of the corporation from taxation.

The charter is unusual and of marked peculiarity. There is no preamble to the act, and no limit to its duration or to the amount of property which it may hold. No obligations are cast upon the corporation; it stipulates for nothing, and agrees to give no consideration whatever for the extraordinary privileges thus granted. The intention was, we suppose, to establish an institution of learning, but there is nothing to prevent the corporation from accumulating and absorbing millions of wealth, and there is no corresponding obligation imposed to compel it to carry out any contemplated object. To determine correctly this question it is

of the utmost importance that we arrive at a just conclusion in regard to the nature of the act. If it be indeed a contract, it must stand, and the State is bound by it, however inexpedient or injudicious it may have been when made. By the constitution of the United States no State can pass any law impairing the obligation of contracts. There is no prohibitory clause in the constitution which has given rise to more protracted litigation, and various and profound discussion, than the one above quoted. The counsel for the defendant in error has cited numerous adjudged cases from the decisions of the Supreme Court of the United States, and contends that they are conclusive and uncontrollable authority here. If they are upon the same point, and pass on the question presented in this case, they must be considered as decisive, for it appropriately belongs to that tribunal to put a final construction on the national constitution. It may be advantageous to examine some of the cases on this subject decided by the Supreme Court of the United States, and compare them with the case we are now considering, that we may ascertain what effect those decisions should have in the present instance.

The first case of this kind which came before that court, and where the subject received a very thorough discussion, was the celebrated one of *Fletcher v. Peck*, 6 Cranch, 87. There, the Legislature of Georgia, by an act of the 7th of January, 1795, authorized the sale of a large tract of wild land, and a grant was made by letters patent, in pursuance of the act, to a number of individuals, under the name of the Georgia Company. Fletcher held a deed from Peck for a part of this land, under a title derived from the patent, by which deed Peck had covenanted that the State of Georgia was lawfully seized when the act was passed, and had a good right to sell, and that the letters patent were lawfully issued, and that the title had not since been legally impaired. The action was for breach of covenant; and the breach assigned was that the letters patent were void, for that the Legislature of Georgia, by the act of the 13th of February, 1796, declared the preceding act to be null and void, as being founded in fraud and corruption. This directly brought before the court the question whether the Legislature of Georgia could constitutionally repeal

the act of 1795 and rescind the sale made under it. The court declared that when a law was in its nature a contract, and absolute rights have vested under that contract, a repeal of the law could not divest those rights, nor annihilate or impair the title so acquired. A grant was a contract within the meaning of the constitution. The words of the constitution were construed to comprehend equally executory and executed contracts, for each of these contain obligations which are binding on the parties. A grant is a contract executed, and a party will always be held to be estopped by his own grant. A party cannot pronounce his own deed invalid, whatever cause may be assigned for its invalidity, even though that party be the Legislature of the State. It was accordingly held that the State of Georgia having parted from the estate of the land, and that estate having passed into the hands of a *bona fide* purchaser for a valuable consideration, that State was constitutionally disabled from passing any law whereby the estate of the plaintiff could be legally impaired and rendered void. No one could for a moment entertain a doubt about that being a case of contract. The State of Georgia had sold the land for a valuable consideration, and conveyed it by deed to the purchasers. The title was actually vested in the grantees, and the contract executed. But had it been only executory, it would have been equally obligatory. Had the purchaser agreed at a future day to pay, and the State in consideration thereof agreed to convey the lands, there could have been very little dispute about its being a contract. The only questions involved in the case were, does the constitutional provision extend to contracts made by States? and has a State, being a party to a contract, a right to declare that contract void, for fraud committed by its own government in the execution of that contract upon the rights of those it represented?

The case of *The State of New Jersey v. Wilson* (7 Cranch, 164) is similar to that of *Fletcher v. Peck* in its principles. There, in consideration that the Delaware Indians released to the State of New Jersey their right to certain lands, the Legislature declared by law that other lands purchased for the Indians should not be subject to taxation. The Indians subsequently, with the consent of the Legislature, sold the lands thus acquired; and the Legisla-



ture, by subsequent enactment, imposed a tax on those lands. This was determined by the Supreme Court of the United States to be in violation of the contract made with the Indians, the benefits of which accompanied the title, and therefore void. Chief Justice Marshall, in delivering the opinion of the court, says: "Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase, on the part of the government, of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangements previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity."

The question to be considered was, did the Legislature pass the act exempting the lands from taxation as an ordinary law, or was it a contract between the parties? It certainly possessed every element of a contract between parties making a mutual agreement. But had the Indians parted from nothing, and the Legislature enacted simply that their lands should be exempt from taxation, would that have constituted a contract, and could not a subsequent Legislature have repealed the statute and imposed a tax upon the land? I think nothing could be plainer. The Legislature cannot, by declaring an act perpetual, render it so.

An act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent Legislature.

The case of *Dartmouth College v. Woodward* (4 Wheat. 518) is a leading case, and is usually cited as containing a most full and elaborate discussion of the principles contended for in this case. In the investigation of the *Dartmouth College* case, the inhibition on the States to impair by law the obligation of contracts received the most thorough and exhaustive examination, and the great influence of the authoritative adjudication then made has remained

unimpaired to the present day. Dartmouth College was incorporated by a charter from the King of Great Britain, in 1769. The Legislature of New Hampshire, by act of assembly, undertook to vary the charter in essential points; to institute a number of additional visitors; and, in fact, to exercise a complete control over it. Marshall, C. J., declares that "the charter was a contract to which the donors, the trustees of the corporation, and the crown, were the original parties, and it was made on a valuable consideration for the security and disposition of property." The act of the State there, which was complained of, transferred the whole power of governing the college from the trustees appointed in accordance with the will of the original founder, as expressed in the charter, to the Executive of New Hampshire. The charter was reorganized so as to entirely wrest the corporation from the management and control of the trustees appointed according to the will of the original founders, and converted it into a machine wholly subservient to the State government. This, of course, was entirely subversive of the contract under which the donors invested their property.

In *Gordon v. Appeal Tax Court*, 3 How. 133, it was held that where the Legislature of a State accepted from banking corporations a bonus as a consideration for the franchise granted, and pledged the faith of the State not to impose any further tax or burden upon them during the continuance of their charters under the act, a tax upon the stockholders, by reason of their stock, was a violation of the contract, and illegal. The same point was ruled in the series of cases growing out of the laws of Ohio creating their banking system.

In 1845 the Legislature of Ohio passed a general banking law, the fifty-ninth section of which required the officers to make semi-annual dividends; and the sixtieth required them to set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company or the stockholders therein would otherwise be subject. In 1851 an act was passed entitled "An act to tax banks, and bank and other stocks, the same as property is now taxable by the laws of this State." The operation of the latter law was to increase

the tax. The Supreme Court of Ohio upheld the law, and declared in favor of its validity, but the Supreme Court of the United States reversed the decision of the State court, on the ground that the first law was a contract founded on a consideration, and that it could not be violated. (Piqua Branch of the State Bank of Ohio v. Knoop, 16 How. 369; Dodge v. Woolsey, 18 How. 331.) The Supreme Court of Ohio refused to follow the above decisions, and the question was again brought before the national tribunal, where the prior rulings were affirmed, and it was distinctly announced that a State, in chartering a corporation, might, in express terms, and for a *consideration*, contract that the corporation should be exempt from taxation, and that a contract so made was protected from subsequent legislation. (Jefferson Branch Bank v. Skelly, 1 Black, 436.)

In all the cases decided by the Supreme Court of the United States, from the very earliest period down to the two recent decisions of *Bridge Prop. v. Hoboken* (1 Wall. 116), and the *Binghampton Bridge* (3 Wall. 52), it is believed a valid consideration was paid in every instance in which we find judgments of that court invalidating a law of the State intended to abrogate a right vested under a previous statute. The right of taxation, like the right of eminent domain, is a high prerogative of sovereignty, and ought never to be surrendered. "That the taxing power is of vital importance," said Chief Justice Marshall, in the case of the *Providence Bank v. Billings*, 4 Peters, 561-2, "that it is essential to the existence of government, are truths which it can not be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." And again: "The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by

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all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature."

In *Brewster v. Hough* (10 N. H. 139) the court denies absolutely that the State, acting through its Legislature, can surrender any portion of the taxing power. The Judge remarks: "The power of taxation is essentially a power of sovereignty or eminent domain, and it may well deserve consideration whether this power is not inherent in the people under a republican government, and so far inalienable that no Legislature can make a contract by which it can be surrendered without express authority for that purpose in the constitution, or in some other way leading directly from the people themselves." This case was referred to and received the unqualified assent of Mr. Justice Daniel in his dissenting opinion in the *Piqua Branch, etc., v. Knoop*. Professor Greenleaf, under the head of franchise, in his edition of *Cruise*, notices the case of *Brewster v. Hough*, and observes: "In regard to the position that the grant of a franchise of a ferry, bridge, turnpike, or railroad, is in its nature exclusive, so that the State cannot interfere with it by the creation of another similar franchise tending materially to impair its value, it is with great deference submitted that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable, to be always preserved in full vigor—such as the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like—and those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist, and necessity requires

that they should continue unimpaired. They are intrusted to the Legislature to be exercised, not to be bartered away, and it is indispensable that each Legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the Legislature disabling itself from the future exercise of power intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people." (3 Greenleaf's Cruise, tit. 27, § 29, note.)

It is an admitted principle in our republican government that one Legislature cannot in any manner abridge or lessen the power of a succeeding Legislature. Each is alike invested with the general power of sovereignty. Therefore one Legislature cannot pass a law irrevocable or irrepealable in its character unless it has imparted to it something in the nature of a compact or contract which will preserve it inviolate under the inhibition of the national constitution. A law which seeks to deprive the Legislature of this inherent and vital principle of sovereignty—the power of taxation—must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding. Every presumption will be made against its surrender, as the power was committed by the people to the government to be exercised, and not to be alienated. (*The People v. Roper*, 35 N. Y. 629; *Mott et al. v. The Penn. R.R. Co.*, 6 Casey, 9; *Commonwealth v. Bird*, 12 Mass. 442.)

Because the Legislature sees fit to grant certain privileges and immunities to a person, it does not follow that they are to be perpetual, and that the law cannot be repealed. The legislative power may enact that an informer shall have a certain interest in a penalty, yet, after information given, the law may be repealed and his interest will be destroyed. (10 Wheat. 248; 6 Pet. 404.) The Legislature may, if there is no prohibition in the organic law to the contrary, exempt certain species of property from taxation, yet they would be at liberty at any time to repeal the exemption and again subject it to the burdens of government. This power ought not to be questioned or doubted; but the opinion seems to prevail with some minds that the right of property is more sacred in chartered corporations than the same right is in the person of



the citizen—a doctrine which I regard as wholly fallacious and indefensible. It is a noticeable fact that in earlier days the courts were strongly in favor of corporations, and the reason was obvious—they were few, a strong prejudice existed against them, the Legislatures were constantly encroaching upon them, and they required protection. Now the reverse is true. They have become so numerous and powerful that they overshadow almost everything in the land; nearly every man is some way interested in them, and the Legislature needs protection against their exactions, demands, and importunities. Had the grant exempting the property of the defendant in error from taxation been made to an individual in the same terms, I do not think it would be for a moment contended that the grant was not repealable, and that the State did not possess the unquestioned right to resume the taxing power at pleasure. Can it make any difference because it was made to a corporation? It seems to me that the case of *Christ Church v. Philadelphia* (24 How. 300) is entirely similar in principle to the case at bar, and conclusive authority—where it was held that an exemption from taxation contained in the charter of a corporation granted by the State was in its nature *durante, bene placito*, and revocable by subsequent act. It appears from the report that, in the year 1833, the Legislature of Pennsylvania passed an act which recited “that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows who would probably else have become a public charge; and, it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burdens of taxes, its means were curtailed and its usefulness limited,” they enacted “that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes.”

In the year 1851 the same authority enacted “that all property, real and personal, belonging to any association or incorporated company which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association

or incorporated company, and from which an income or revenue is derived by the owner thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." It was decided in the Supreme Court of Pennsylvania that the exemption conferred upon the plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the constitution of the United States as tending to impair a legislative contract which they alleged to be contained in the act of Assembly of 1833. The United States Supreme Court say: "The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the Legislature was spontaneous, and no service or duty or other remunerative condition was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual or was designed to continue during the corporate existence." And it is further added: "It is in the nature of such a privilege as the act of 1833 confers that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign." This decision was made by an unanimous bench, subsequent to the Ohio case in which three judges dissented, and shows most clearly that a grant of the nature of the one which we are now considering was not regarded in the light of a contract.

No importance or weight can be attached to that provision of the charter of defendant in error which excludes it from the operation of the seventh section of the general law in relation to corporations. It is incompetent, as before observed, for one Legislature to attempt to derogate from the power or tie up the hands of a subsequent Legislature. For an irrepealable contract of the character here presented no authority or precedent is to be found. Whilst the exemption continued, the property was free from taxa-

tion; but when the law was repealed, it then fell back in the general mass — liable, like all other property, for the burdens of government. It has been truly said that “in a representative democracy the right of taxing the citizen is an inseparable incident of popular sovereignty.” And this right must be preserved unimpaired in order that the revenue and burdens necessary to support the government be not unequally distributed or onerously imposed on any particular class. The rights and obligations of the citizen and the government are mutual and correlative; the one owes the duty of allegiance, the other of protection. Whilst protection is held out and extended, the necessary support for the government must be furnished. Giving away the taxing power in perpetuity inevitably tends to the destruction of the State. If ten millions can be released in one day, one hundred millions may be released in another; and, the principle being once established, the process might go on till every resource of revenue was gone. Although the taxing power is but an incidental one, to be exercised as the means of performing governmental functions, it is nevertheless a branch of the legislative power, which always, in its nature, implies not only the power of making laws, but of altering and repealing them as the exigencies of the State and circumstances of the times may require. (Rutherford’s *Inst. of Nat. Law*, book 3, ch. 3, § 3.)

When the charter of the University was granted, the Legislature might have considered it reasonable to foster and encourage it in its infancy and confer upon it privileges and immunities while struggling into existence. But no provision is made in express terms, or by reasonable intendment, that those immunities should be perpetual and have the effect of withdrawing millions of subsequently acquired property from taxation. In 1853 taxes were light and the State debt was small, and exemptions could be made without great detriment. After that period the State embarked in a false and ruinous system of loaning its credit to corporations, by which it incurred an immense debt; then followed the civil war, which increased its already burdensome obligations, and taxation became exceedingly onerous.

In this condition of things it was deemed the part of wisdom

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to make all property within the jurisdiction of the State, receiving the benefit of her laws and protection, contribute its proper proportion and share the common burdens. This was entirely a matter resting in the sound discretion of the legislative branch of the government, and we have been unable to find any objection to their exercise of the power.

The judgment will be reversed and the petition dismissed. The other judges concur.

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HENRY W. WILLIAMS, Respondent, v. CHARLES J. CARPENTER.  
Appellant.

1. *Practice—Trial—Jury—When presumed to be waived.*—Where both parties to a suit are present and submit the cause to the court on the evidence, and neither of them demands a jury, it may be presumed that the right of trial by jury is waived.
2. *Confirmation, Certificate of—Admissibility of Parol Evidence to correct errors in.*—Suit in ejectment was brought by the representatives of Joseph Lacroix to obtain the title to certain property adjoining St. Louis. The proof embraced a certificate of confirmation, under the act of Congress passed May 26, 1824, which named "Louis Lacroix" as the person entitled to the property in dispute. If the case had proceeded upon the theory that Joseph Lacroix and Louis Lacroix were two distinct individuals actually living in St. Louis at the date of the certificate, parol evidence would be inadmissible to show that the instrument was intended for a different person than the one therein named, thereby taking the title from Louis Lacroix, in whom it had been vested, and transferring it to one in whom it had not been vested. But parol evidence, by all the authorities, was admissible to show that Louis Lacroix resided in a different city, and died long before the claim to the property was proved, and that the person under whom the adverse party claimed was an imposter. And where the proof ascertained that there was no other person within the class to whom the certificate might have been given but Joseph Lacroix, parol evidence was admissible to prove his identity with the person described in the instrument as "Louis Lacroix," and a mistaken insertion by the recorder of the name of "Louis" instead of "Joseph."
3. *Confirmation, Certificate of—Nature and weight of, as Evidence.*—A certificate of confirmation under the act of 1824 does not convey title, but is merely *prima facie* evidence of the existence of certain facts at a former date, and may be rebutted or disproved by other competent evidence. It is in the nature of a deposition, and the testimony of witnesses or a deposition would be admissible to correct its errors.

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4. *Hunt's Minutes, Evidence of what.*—The minutes of Recorder Hunt, where objection is offered, are inadmissible as a deposition to prove the facts testified to by witnesses therein. But in the absence of any such objection, they are admissible, like any other document, to show what they contain. Whether or not the contents are relevant or competent on the issues in the case, must be determined by the general rules of evidence.

*Appeal from St. Louis Circuit Court.*

This was an action of ejectment to recover possession of a part of a lot of one by forty arpents in the Grand Prairie common fields adjoining St. Louis, and embraced in United States survey 1664. Both parties claimed title under the proof made before Recorder Hunt, pursuant to the act of May 26, 1824, and shown by his minutes of testimony. They also relied upon a certificate of confirmation, issued by said Hunt to "Louis Lacroix," of the tract in controversy. The evidence in the case did not differ materially from that shown on the former trials of the same cause, except that it embraced testimony that Joseph Lacroix, under whom plaintiff claims, had actually inhabited and cultivated this lot prior to the change of government in 1803. The evidence will be found reported in full in 28 Mo. 454, and 35 Mo. 52, and should be read in order to a proper understanding of this case.

In the second trial of this cause, counsel for plaintiff asked leave to file an amended petition, which was refused, and it went up to this court on the original pleadings. At the last trial, the court below granted leave to file such amended petition, being in some respects in the nature of a bill in equity, whereupon counsel for defendant moved to strike out portions thereof, which motion was overruled. But as the case passed upon by the present decision is considered as an action of ejectment on the original petition, the new pleadings and arguments of counsel relating thereto need not be stated here.

*Krum, Decker & Krum*, for appellant.

I. The court below erred in admitting illegal and incompetent testimony. The testimony objected to neither proves nor tends to prove the issues made by the pleadings. If it was necessary on the part of the plaintiff to prove what took place before the



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recorder of land titles in 1825, so as to show that the recorder made a mistake in his record entry, it is plain that the evidence objected to does not tend to prove this issue. For any other purpose, or in respect to any other issue in the case, the testimony objected to is wholly foreign and immaterial.

II. The evidence in the record does not support the finding of the court below, as recited in the decree.

III. The decree in this case is predicated upon the finding of immaterial issues or facts.

*Glover & Shepley*, for appellant.

I. The case is a peculiar one. The purpose of the petition is not exactly to reform a deed or other title paper, but to reform at most some affidavits or depositions filed with the recorder as proofs of title, or an opinion of the recorder, which is not a title, but evidence *prima facie* of title. The proceedings are very nearly akin to a bill to reform the testimony of a witness, alleged to have been erroneously taken down by the notary, if such a thing could be. Of course, if such a thing can be done by the decree of the court, three facts ought to be clearly proved, viz: 1. What the witness did testify. 2. That a different statement was written down by mistake. 3. That the recorder made a mistake in his certificate.

But to undertake to prove, as was done in this case, that a witness went before Recorder Hunt and testified that "Joseph Lacroix" cultivated a lot, and that the recorder made a mistake and wrote "Louis" in the place of "Joseph," by evidence that only contradicts the statement of one witness as his testimony is put down by the recorder, is an absurdity. It might as well be said that every officer who takes depositions makes a mistake when he writes down from the mouth of one witness what is afterward denied by another. We deny that there is any real evidence of the alleged mistake. Mr. Evans is the only witness, and he was not present when the evidence was given in or written down. Further, the right to correct a mistake belongs to him only who had the prior right, but it is not shown that Joseph Lacroix had

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any prior right; and if this were shown, he would not need to reform the proofs. (19 Mo. 570; 25 Mo. 448.)

II. Plaintiff's cause of action is barred by the statute of limitations.

It arose and was perfect the moment when the alleged mistake was entered on the recorder's minutes. That mistake, if in fact it was made, vested the title in Louis Lacroix in violation of Joseph's right, and Joseph Lacroix had a right of action immediately. It was not necessary, in order to give Joseph Lacroix a right of action, that Louis should enter on the land or possess or improve it. These facts might not transpire at all, and Joseph Lacroix would remain without any remedy to protect himself against the ultimate loss of his rights. Adverse possession is a necessary element in some particular causes of action. On such actions the statute will not run until there is an adverse possession. This is the fact in relation to ejectment, forcible entry and detainer of lands, and replevin and detinue of chattels. Without adverse possession, such causes of action cannot exist. Not so with many other actions, such as for deceit or trespass, or a bill for specific performance, or for rescission of a contract, or to set aside a fraudulent conveyance, or enforce a trust, or reform any instrument whatever. These may state a perfect cause of action without adverse possession. To say that such actions are not limited unless there is an adverse possession, is to say they are not limited at all, or, at most, not limited unless the opposite party shall give his consent to such limitation by entering into possession. The present suit is one of the latter class. (*Eigelberger v. Kibler*, 1 Hill Ch. R. 113; *Whalley v. Whalley*, 3 Bligh, 9, 12; *Hamilton v. Hamilton's Exr.*, 18 Pa. St. 22; *Jones v. Connoway*, 4 Yeates, 109; *Mayfield v. Simondson*, *Cooke's Tenn. R.* 437; *Finley v. Harrison*, 5 J. J. Marsh. 154, 161; *Young v. Mackall*, 3 Md. 407-8; 2 Story Eq. Jur. 1027, § 1521, *n.* 2; 7 Mo. 610.) Joseph Lacroix could have sued in 1825, but did not. The statute of limitations immediately began to run, and ran on over forty years from the time when the cause of action accrued, as against any proceeding in equity, to October 23, 1865.

When the statute is once set in motion, it does not stop. (Smith

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v. Newby, 13 Mo. 159; Landes v. Perkins, 12 Mo. 238; 2 Story Eq. Jur. 1028.)

Such being the right of the party to sue, and he being under no disability, the statute of limitations is applied by analogy to this case. (Brault v. Howard, 39 Mo. 21; 6 Mo. 257; 26 Mo. 112; Clark v. Swift, 3 Met. 390; Brink v. Brink, 1 Bibb, 255; Smith v. Carney, 1 Litt. 296; Taylor v. Bates, 4 Dana, 200; De Cordova v. Smith, 9 Texas, 129; *id.* 150; Collard v. Tuttle, 4 Verm. 492.)

We concede that the law is settled that, in respect to causes of action founded on fraud or mistake, there is no right of action until the fraud or mistake is discovered, and until such discovery the statute of limitations does not begin to run. But it is well settled that as soon as the fraud or mistake is discovered, the statute does run. (2 Scho. & Lefroy, 636; Brookshank v. Smith, 2 Young & Col. 60; Pugh v. Bell *et al.*, 1 J. J. Marsh. 402; Crane v. Prather, 4 *id.* 77; Craft v. Townsend, 3 Dess. 239; Shields v. Anderson, 3 Leigh, 729; 1 Watts, 401; Heywood v. Marsh, 6 Yerger, 69, 73.) No one claiming under Joseph Lacroix can be suffered to dispute the confirmation, record, or certificate. They claim under them, and the law presumes that they knew them from their first existence. (3 How. 333; 1 Gil. 317, 330-1; 2 Ash. 312.) When, then, are we to fix the time of the discovery of the supposed mistake? We insist that it is fixed, by the law of the case and the pleadings, immediately after the fact of the confirmation, in 1825. A plaintiff cannot, by inserting in his petition a statement that he only made the discovery at a late day, defeat the statute of limitations; hence, he must aver and prove when in fact the discovery was made. (Shelby v. Shelby, Cooke's Tenn. R. 183.) An undiscovered fraud or mistake is an exception forced upon the statute of limitations by considerations of necessity. But no one can take the benefit of an exception without pleading and proving his case within it. Plaintiff has made no explanation of the circumstances under which the alleged mistake was discovered; nor has he denied knowledge of it by Joseph Lacroix.

The conclusion, therefore, must be that he knew all about it

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as early as 1825, and as soon as made. (*Carneale v. Parker*, 7 J. J. Marsh. 455; *Jenkins v. Brewitt*, 5 Blackf. 7; *Bruce v. Child*, 4 Hawks, 372; *Westbrook v. Harbeson*, 2 McCord's Ch. 112, 118; *Steele v. Kinkle*, 3 Ala. 352; 2 Porter's R. 58, 73-4; *Bertine v. Varian*, 1 Edwards' Ch. 347; *Chalmers v. Bradley*, 1 Jac. & Walker, 66-7.) If Joseph Lacroix had held the legal title, it would have given him constructive possession; but the legal title was in Louis Lacroix, and the constructive possession was always in him or his heirs or their assignees. (*Green v. Liter*, 24 Mo. 414; 8 Cranch, 232.) So that, up to the time of filing the original petition, in 1856, no possession had existed under Joseph Lacroix for thirty-one years; and if that petition had set forth the equity of Joseph Lacroix, it was extinguished by limitation of twenty years. But the right of Joseph Lacroix to the land, as now claimed in equity, was not sued for in 1856. That suit of 1856 was a mere ejectment, and this court decided (35 Mo. 70) that no recovery could be had on the petition, and that another cause of action must be set forth to meet the case. Hence, in 1865, for the first time, plaintiff sued on his equity and dismissed his first petition. (*Gray v. Berryman*, 4 Munf. 181; *Christmass v. Mitchell*, 3 Iredell's Ch. 535; *Holmes v. Trout*, 1 McLean 1; *Holmes v. Trout*, 7 Pet. 171; 6 Pet. 61; *Lucard's Lessee v. Davis*, 6 Pet. 124.) This amended petition having been filed, the original cause of action ceased to exist. (*Gen. Stat.* 1865, p. 670, § 13; *Barry v. Ambrose*, 28 Mo. 46.) If the bar of the statute may be defeated in this manner, a claimant may commence a suit of any sort for a piece of property, keep it going until defendant's witnesses are dead, and then disclose his real claim by an amendment.

This being an action for relief (*i. e.*, a bill in equity), and not being sued on till October 23, 1865, the act of 1849 had been running on it sixteen years. This statute was borrowed from New York (*Voorhies' Code* of 1864, p. 99, § 97; *Bruce v. Tilton*, 25 N. Y. 199, 200), in which it was held that adverse possession had nothing to do with this statute. (*Spore v. Wells*, 3 Barb. Ch. 202-3; *Roberts v. Sickles*, 30 Barb. 178; *Alexander v. Pendleton*, 8 Cranch, 462.)

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No question is made that an adverse possession which would bar an action at law if the title was legal, will bar all remedy by bill of equity in the same case if the title is equitable only. To such a case the statute of limitations expressly applied in equity. The ground of this defense is not strictly that of limitation. It is called lapse of time, and laches or staleness of demand. (Story Eq. Pl. p. 618, § 756, *a*; Prevost v. Gratz, 6 Wheat. 492; 1 McLean, 147; 9 Pet. 405; Bonney v. Ridgard, 1 Coxe's Ch. Cas. 149; Beckford v. Wade, 17 Ves. 97; Johnson v. Johnson, 5 Ala. 102; Giles v. Baremore, 5 Johns. Ch. Cas. 551; Michoud v. Girard, 4 How. 561; Ellison v. Moffat, 1 Johns. Ch. Cas. 46; Ray v. Bogert, 2 Johns. Ch. Cas. 432; Jenkins v. Pye, 12 Pet. 254, 262; Ward v. Van Bokkelen, 1 Paige, 100; Fenwick v. Macey's Heirs, 1 Dana, 278; *id.* 280; 2 Scho. & Lefroy, 637; *id.* 297; Ralls v. Hughes, 1 Dana, 408; Baird v. Baird, 5 J. J. Marsh. 581-2; Hunt v. Hamilton, 9 Dana, 91; Atkinson v. Robinson, 9 Leigh, 393; Barnett v. Emerson, 6 Mon. 607; Hite *et al.* v. Hite, 1 B. Mon. 177; McLean v. Barton, Harrington's Eq. R. 285; Perry v. Craig, 3 Mo. 516; Pendleton v. Galloway, 19 Ham. 178.)

It may be admitted that while no suitor can have relief in equity who does not come in a reasonable time, and in the lifetime of the parties to the transaction to be investigated, the exact period of time is not definitely fixed, but a large majority of such cases have been cut off by thirty years, and many by less time, there being no disability on the part of claimant. What is unreasonable delay, and makes a demand stale in equity, depends much on the period of limitation fixed at law. Our statute of 1825 made twenty years the legal bar of time; the statute of 1847 made ten years; the statute of 1849 made a positive statutory bar to bills for relief in ten years from the time the cause of action accrued; so that after 1847, when the statute bar by time was ten years at law, the plaintiff waited fifteen years before suing the present action. Spore v. Wells, 3 Barb. Ch. 202, was a case in which the claim was held stale in fourteen, the legal bar being ten years.

III. The defendant, Carpenter, is an innocent purchaser of the property in dispute, for a valuable consideration, paid without



notice of any claim under Joseph Lacroix or his representatives. (2 Ashmead, 312; 5 Call. 537; 1 Gilman, 317, 330-1; 3 Leigh, 365; 7 *ib.* 393, 398; 4 Scammon, 37; 6 Paige, 323; Vaughn v. Tracy, 22 Mo. 415; Beattie v. Butler, 21 Mo. 321.)

IV. The decree in the case is peculiar; it does not grant the relief prayed for, nor respond to the prayer of the petition; the paper is not reformed; no title is vested in the plaintiff; no decree, in fact, is made, but a judgment given as in ejectment or on a legal title, when there is no evidence of any legal title in plaintiff.

*Whittlesey*, for respondent.

I. A name is but one of the means of identifying the person. He may be identified in other ways; and where the person is identified the mistake in the name shall not vitiate the patent, conveyance, or deed. (See authorities cited at length by counsel in 35 Mo. 52.)

To have received a title by the act of 1812 it was necessary that the claimant should have been an inhabitant of the village of St. Louis, and should have both claimed and possessed and cultivated the lot. All these evidences of identity of person attach to Joseph Lacroix; none of them to Louis, who died prior to 1810, there being no evidence to show that Louis was an inhabitant of St. Louis or cultivated or claimed this lot, excepting the evidence of the claim and the patent certificate in the name of a Louis Lacroix. The certificate issued by Hunt may have been filled up with the proper name, and was delivered to the proper person, and the object of the petition and evidence of plaintiff was to show that it had been delivered to the proper person, Joseph Lacroix, whether issued in his name or in that of Louis.

II. The court has authority, not to correct the error upon the minutes of the United States Recorder, but to prevent parties from using the evidence which the minutes present for the purposes of a fraud; and in this way a court of equity can correct the mistake and prevent the fraud. (*Lytle v. Arkansas*, 22 How. 235; *Lindsey v. Hawes et al.*, 2 Black, 554; 9 How. 314; *Cunningham v. Ashley et al.*, 14 How. 377; *Wright's Heirs v. Christy's Heirs*, 39 Mo. 125.)

III. The defendant had not been in possession for ten years at time of suit brought, and there is no bar by lapse of time except by an adverse possession. (*Bollinger v. Chouteau*, 20 Mo. 89.) In this case the legal title passed by act of Congress of June 13, 1812. The proof and minutes of the recorder, and the certificate issued by him, are but evidence of the grant of 1812; and as Joseph Lacroix took the title by the grant of 1812, he could sue no one to correct any mistake until some one claimed by virtue of that mistake, which was not until 1852.

IV. The defendants are not innocent purchasers for a valuable consideration in good faith, for the reason that they have never procured the legal title to the land. They claim simply because they are the representatives of a man named Louis Lacroix; but if he did not possess and cultivate prior to 1803, and did not appear to prove his claim before Hunt as recorder (and all the evidence shows that he did not), then the defendant did not procure any evidence of title under which to claim as innocent purchaser.

*Hill*, for respondent.

I. A claim to real property will not be barred by a lapse of time shorter than that which would have barred an action of ejectment at law, and the adverse possession is the only test to be applied. (Ang. on Lim. § 25; *Dugan v. Gittings*, 3 Gill. 138; *Bollinger v. Chouteau*, 20 Mo. 89; *McNair v. Lott et al.*, 24 Mo. 285; 6 Monroe, 192; 4 How. 503.) Courts of equity act in obedience to the statute of limitations, and not in analogy to them. (Ang. on Lim. § 26; *Hovendon v. Lord Annesly*, 2 Scho. & Lefroy 607; *Bollinger v. Chouteau*, 20 Mo. 89; *Chalmondely v. Clinton*, 2 Meriv. Ch. 171; *Chouteau v. Burlando*, 20 Mo. 482; *Lytle v. Arkansas*, 22 How. 193.) In actions for real estate, or concerning real estate, whether the cause of action be legal or equitable, or both legal and equitable, the bar of the statute of limitations must depend entirely upon the adverse possession. No different rule can be settled with any safety. (*Magwire v. Tyler*, 1 Black, 195; *Chalmondely v. Clinton*, 2 Meriv. Ch. R. 176; Ang. on Lim. § 326; 25 Mo. 182.)

II. Plaintiff claims that he is entitled to prove in law and in

equity who was the person intended by the name of Louis Lacroix. If Joseph Lacroix was the person intended to be described in the certificate of confirmation, his heirs and grantees are entitled to the benefit of the confirmation; and the evidence of confirmation—viz: the recorder's certificate—will inure to the benefit of Joseph Lacroix's grantees. The confirmation certificate issued to Lacroix by Hunt, under the act of 1824, is only *prima facie* evidence of title under the act of 13th June, 1812. (McGill v. Somers, 15 Mo. 80; Joyal v. Rippey, 19 Mo. 660; Montgomery v. Sandusky, 9 Mo. 705.) To this extent the confirmation certificate is evidence of a confirmation, under the act of 13th June, 1812, to Louis Lacroix, an inhabitant of the village of St. Louis before the 20th of December, 1803, who cultivated a field-lot in the Grand Prairie belonging to said village before 1803. The title of the United States has passed, by force of the act of 1812, to a Lacroix who will answer the descriptions in the acts of Congress. No names are given in the act of 1812. The confirmations are *en masse* to the inhabitants of St. Louis who cultivated or used lots in, adjoining, or belonging to, the town of St. Louis. (Glasgow & Taylor v. Horte, 1 Black, 514.) The United States had parted with all title to this lot on the 13th June, 1812, and the question in this case is, to whom was the grant made? Plaintiff establishes, by evidence conclusive and uncontradicted, that Joseph Lacroix cultivated this Grand Prairie field-lot in Spanish times; that he proved up this cultivation before the recorder in March 3, 1825; by Pierre Barribeau, the adjoining proprietor on the north; that the recorder entered the name Louis for Joseph; and the cause of this error appears on the face of the minutes of the recorder who writes the affidavit of Louis Lacroix, and the signature affixed to it is "Joseph Lacroix—his  $\times$  mark."

Plaintiff insists upon the clear right of the court to apply the rule "*falsa demonstratio non nocet*"—if there be a sufficient description of the person or subject intended, independent of the *falsa demonstratio*. This rule can be applied at law or in equity, but it has been much more frequently applied in equity than at law. The old rule making a distinction between the rules of evidence in cases arising under wills and cases arising under

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deeds has been abolished for nearly a century. (1 Greenl. on Ev. §§ 289, 291; Beaumont v. Fell, 2 P. Will. 141; 2 Phillips on Ev., Cow. & Hill's notes, 769, 717, 770-3, etc.) So, if the ambiguity upon the face of the tabular abstract of confirmations be latent, the evidence is clearly admissible. (1 Greenl. on Ev. § 300.) Pierre Barribeau is bounded south by Joseph Lacroix, and Louis Lacroix is bounded north by Pierre Barribeau. Louis Lacroix appears as a witness for Pierre Barribeau, and signs his name "Joseph Lacroix—his ✕ mark."

The evidence is also admissible at law under the rule "*falsa demonstratio non nocet, cum de corpore constat*." Mr. Greenleaf states the rule as embracing "those cases in which, upon applying the instrument to its subject matter, it appears that, in relation to the subject matter, whether person or thing, the description in it is true in part, but not in every particular." (1 Greenl. on Ev. 301.) Whether the case be tried at law or in equity, the rules of evidence are the same; and the only question in the case, whatever the form of the proceeding may be, is whether parol and documentary evidence is admissible to show that Joseph Lacroix is the person intended, and whose field-lot was proved up under the statutes of 1824 and 1812. Plaintiff says the description of Lacroix is false in the Christian name, and that the other particulars of description given in the act of Congress granting the land to the inhabitant, cultivator, and possessor, prevents the false description from injuring the title of Joseph Lacroix to the lot confirmed to him and described in the certificate as the lot of Louis Lacroix. The authorities are full that "*falsa demonstratio non nocet*" in such cases. (Thomas v. Stevens, 4 Johns. Ch. 607; Conally v. Pardon, 1 Paige Ch. R. 291; Cow. & Hill's notes to Phil. on Ev. p. 533, n. 940, vol. 3, § 1369; Smith v. Smith, 1 Edw. Ch. R. 189, and 4 Paige, 271; Vernon v. Henry, 3 Watts, 385; Tudor v. Terrell, 2 Dana, 47, 50-1; Wigram on Extr. Ev. 81, 122.) In Jackson v. Bonham, 15 Johns. 226, patent issued to Moses Minney. In ejectment it was held that plaintiff, claiming under Moses Winier, could prove that Winier was the person intended, under the rule "*falsa demonstratio non nocet*." So in Dowret v. Sweet, Amble, 75:

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a legacy was to John and Benedict, sons of John Sweet. John Sweet had only two sons, viz: Benedict and James. *Held*, that James might take; for, after rejecting what was false in the description, enough remained to indicate the intention of the testator and justify the application of extrinsic evidence. (Stockdale v. Bushby, 19 Ves. 381; Doe v. Huthwaite, 3 Barn. & Al. 632; Wigram on Extr. Ev. 81; Standen v. Standen, 2 Ves. Jr. 589; Smith v. Coney, 6 Ves. 42.)

The learned Justice Cowen, in commenting upon the force and effect of the rule *falsa demonstratio non nocet* (note 640, p. 533, of Phil. Ev. vol. 3, p. 1372), notices the case of Jackson v. Stanley, 10 Johns. 137, where a patent to David Hungerford, a soldier, was produced in an action of ejectment by the heirs of Daniel Hungerford, and comments upon the effect of the rule. In that case the only description besides the name was the word "soldier," and the court avoided applying the rule directly, although the evidence had been admitted and the jury had found that Daniel Hungerford was the soldier intended. As the State had granted the land subsequent to the patent to Daniel Hungerford and his heirs, there was no occasion to enforce the rule of evidence we contend for; for, as the title passed by the act of the Legislature of New York, if the patent was void, as contended by defendant, the plaintiff must recover without invoking the rule *falsa demonstratio non nocet*. A critical examination of the opinion shows that the ancient opinion that a grant is void where there is a mistake in the Christian name is repudiated.

Lord Coke is cited, Co. Litt. 3 *a*, as stating the law correctly—"that if lands be given to Robert, Earl of Pembroke, when his name is Henry, or to George, Bishop of Norwich, when his name is John, the grant is still good, because there can be but one of that name and dignity." The court proceeds: "If, then, the patent in this case had designated the Hungerford intended by specifying the regiment and company to which he belonged at the time of his death, it might have been good as being equally susceptible of being reduced to a certainty. But the patent adds no description or demonstration to the name of the patentee. It is simply a patent of the lot to David Hungerford," etc. The



learned Chief Justice thus admits that a misnomer does not avoid a patent where there is some description connected with the name by which to designate the person intended.

In *Jackson v. Goes*, 13 Johns. 524, it was held, unanimously, that the identity of the patentee is a matter "that may be inquired into, in an action of ejectment, collaterally;" that the doctrine was settled by the case of *Jackson v. Stanley*, 10 Johns. 126, and that the case of *Jackson v. Hart*, 12 Johns. 77, was not intended to overrule the case of *Jackson v. Stanley*. The case of *Jackson v. Goes* overruled in effect the case of *Jackson v. Hart*, and the doctrine explained by Mr. Chief Justice Thompson is clearly the law of evidence as established by modern authorities. (See opinion of Mr. Chief Justice Thompson.)

The case of *Jackson v. Lawton*, 10 Johns. 23, cited by Mr. Chief Justice Scott in support of his opinion that the confirmation certificate is void by reason of the latent ambiguity in the false denomination of the Christian name, has no bearing upon the question at issue. The controversy in *Jackson v. Lawton* was between two patents—one dated October 28, 1811, to Mr. Manlius; the other, March 5, 1812, to Mr. Allen; and both for same lot No. 128. The action was ejectment, and the court held the elder patent was the better title, and in an action at law its validity could not be questioned.

Plaintiff does not seek to impeach a patent in this action. He merely asks the court to hear the evidence that his grantor is the person entitled to the certificate under the act of Congress of 1824, and that he is the person confirmed under the act of 1812, and the only person who answers the descriptive terms of said acts granting the title. In *Jackson v. Stanley*, 10 Johns. 136, the precise question arose that arises in this case. Chief Justice Kent, who delivered the opinion in *Jackson v. Lawton*, delivered the opinion in this case. (See comments by Hon. Esek Cowen, note 950, vol. 3, 2d ed. Phil. Ev.)

The case of *Jackson v. Lawton*, and that of *Jackson v. Hart*, 12 Johns. 81, based upon that of *Jackson v. Lawton*, were finally disposed of in *Jackson v. Boneham*, 15 Johns. 226, already referred to. These cases settled the law in New York. The question

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never was raised again until 1828, in the case of Jackson v. Cody, 9 Cow. 140, and it was again settled in favor of the rule invoked by plaintiff. There is a far stronger case presented here for the plaintiff than in any case cited.

The certificate of the proof of inhabitation, cultivation, and boundaries, issued in 1825 to Louis Lacroix, had special reference to the act of 1812, by which the title passed, and the descriptive terms of the act are and were a part of the certificate of proof of confirmation. The act is made part of the certificate by express recital, so that the certificate is to Louis Lacroix, an inhabitant of St. Louis before 1803, who cultivated a field-lot in the Grand Prairie fields belonging to St. Louis, and adjoining Barribeau's lot on the south, before 1803. The parol proof shows who this Louis Lacroix is, by proving to a certainty that the inhabitant and cultivator, before 1803, of the field adjoining Barribeau, was Joseph Lacroix, and no other person, and that he was the man who made the proof before Hunt in 1825, and to whom Hunt delivered the certificate.

HOLMES, Judge, delivered the opinion of the court.

This case has already been twice before this court: 28 Mo. 453; 35 Mo. 52. There are some preliminary questions to be disposed of. It is made to appear by the record that previous to the last trial the plaintiff asked leave to file an amended petition, and leave was refused. This amended petition contained certain statements of facts, looking to equitable relief, combined and blended in the same count, with a cause of action in ejectment under the statute, or rather statements of facts which were more properly matters of evidence. The plaintiff does not complain that there was any error in refusing to allow this amended petition\* to be filed. The case appears to have been tried as an action of ejectment on the original petition, and so it will be considered here. (Billon v. Larimore, 37 Mo. 386; Peyton v. Rose, 41 Mo. 261.)

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\* Application was made by plaintiff's counsel, at the second trial, to file the amended petition referred to, and leave was refused. At the last trial leave was obtained and the amended petition filed.

The case appears to have been tried before the court sitting as a jury. Both parties were present, and submitted the cause to the court on the evidence. It does not appear that either party demanded a jury. It may be presumed that the right of trial by jury was waived. (*Vaughn v. Scade*, 30 Mo. 600; *Brown v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 299.)

The verdict contains a recital of the particular facts found to have been established by the evidence, but it is essentially nothing more than a verdict for the plaintiff on the issues in the case, with an assessment of the damages and monthly value of the premises; and judgment is given for the possession, damages, monthly value, and costs.

The verdict rendered may be considered as a finding of the particular facts from which, as facts proved, the court sitting as a jury had inferred and found for the plaintiff the main fact in issue, namely: that the plaintiff was entitled to the possession of the premises in controversy.

The more material fact in dispute under the issue would seem to have been shortly this: whether it was Joseph Lacroix, under whom the plaintiff claimed, who appeared before the recorder of land titles, in 1825, as the claimant of the lot in question, and proved this claim, and was the identical person and claimant to whom the certificate of confirmation was in fact issued by the name of Louis Lacroix.

The sufficiency of the evidence to warrant the finding, if extrinsic and parol evidence were admissible at all, for the purpose for which it was offered, can scarcely admit of question. It was enough to justify a moral conviction in the mind of the jury of the truth of the matter found. It may be said that it was sufficient to raise an irresistible presumption of the truth of that matter. We cannot say that the verdict was not warranted by the evidence. We do not understand that error is claimed on this ground.

We come, then, to the question whether extrinsic evidence was admissible at all with reference to the person named in this certificate. The former decisions in this case are first to be considered. In the first decision the majority of the court appear

to have rested the reversal of the judgment upon the state of facts presented on that record. The opinion delivered by Scott, J., shows that the case had been tried "on the theory that Louis and Joseph Lacroix were different persons," there being evidence that "there were two such individuals in St. Louis." It was said that the circumstances of the case did not "warrant the application of the principle that by parol evidence one may show that he is the person named as a grantee or patentee." The ground of the decision appears to have been that, on the state of facts before the court, Joseph Lacroix could not be permitted to prove by extrinsic evidence that he was "the person intended," or was "the person for whom the bounty was intended," and thus take away the title from Louis, in whom it had been vested by the instrument, and transfer it to Joseph, in whom it had not been vested. The stress was laid upon the *intention*. This is the principle that is applied to wills: that parol evidence is inadmissible for the purpose of proving that a thing in *substance* different from that described was *intended*, or of changing the person described, or, generally, of proving *intention*. (Wigram on Wills, 89-92.) The position was illustrated from the cases of patents. It was conceded that parol evidence would be admissible to prove that *George Housman* and *George Hosmer* were the same person, but not to prove that a grant to the former, a real person, was intended for the latter, another person. Richardson, J., granted this point, and concurred in the reversal, on account of the admission of improper evidence; but expressed the opinion that, "if Joseph Lacroix was the person who appeared before the recorder and made the proofs, and the recorder intended to give him the certificate of confirmation, but by a mere mistake wrote the name of *Louis* instead of *Joseph*, then Joseph or his representatives, on showing these facts, ought to be permitted to take the benefit of the certificate of confirmation. We think it may fairly be inferred that the state of the case here supposed was not distinctly presented on that record.

It appears that the second decision was placed upon precisely the same ground as the first, and was predicated on the same state of facts; and it was said, "this judgment and the former

decision cannot stand together." Upon that state of the case, and upon that ground, we should probably entertain the same opinion and decide the case in the same way.

The case as now presented before us on this record is certainly quite different. The fact is found, on ample evidence, that there were not two persons—inhabitants of the town of St. Louis, claiming a lot in the Grand Prairie common field of St. Louis, upon inhabitation, cultivation, or possession, prior to 1803, before that date or afterward—one named Louis Lacroix, and the other Joseph Lacroix, either of whom might have been confirmed in his claim, or might have proved this claim and been entitled to this certificate; but it was proved and found that the man Louis Lacroix, under whom the defendant claims, was an inhabitant of St. Charles, and died long before this claim was proved, and that he never had been an inhabitant of the town of St. Louis, nor a claimant of a lot in the Grand Prairie common field of St. Louis, within the meaning of the acts of Congress. It is thus clearly shown that he never came within the class of persons contemplated by those acts. It does not appear that, during his lifetime, he ever pretended to have such a claim. The idea seems to have originated with his heirs. Parol evidence was admissible by all the authorities to show that he was not the person named in the instrument, but an impostor. It has been so held even in the case of a patent. (*Jackson v. Stanley*, 10 Johns. 133; *Jackson v. Goes*, 13 Johns. 518.) It is certain that he could take no benefit by this certificate. It conferred no right on him, and the defendant is left standing on a bare possession, showing no other title.

The next question is whether the certificate could be made available to Joseph Lacroix by extrinsic evidence. It is not a question of the intention of the government or of the recorder, *dehors* the instrument. It is simply a question of the identity of the person Joseph Lacroix with the person named and described in the certificate. The ambiguity arises only when the instrument comes to be applied to the person. The proof ascertains that there was no other person within the class to whom it might have been given but this identical Joseph Lacroix. It shows further, and irresist-



ibly, that it was this man Joseph Lacroix who actually appeared before the recorder as the claimant, and made proof of this claim, and received the certificate, and whose name was mistakenly written Louis, instead of Joseph, in the minutes, the registry, and the certificate. There were other words of description of the person in these documents besides the bare name. The minutes read, "Louis Lacroix, claiming one by forty arpents, a field-lot in Big Prairie, St. Louis, bounded," etc.; and the certificate reads that, under the acts of Congress, Louis Lacroix "was confirmed in his claim to a tract of land of one by forty arpents, situated in the Grand Prairie common field of St. Louis," with a survey of the boundaries. Now, strike out the word "Louis," and the question becomes simply this: whether enough remains to admit of the application of the principle *falsa demonstratio non nocet*. It is not merely Louis Lacroix, but the man Lacroix who was claiming this lot before the recorder on that day, and causing it to be proved, and to or for whom this claim was registered as proved, and this certificate delivered. This was enough, we think, to let in the proof that was made. We think the extrinsic evidence was admissible, both on this principle and on the principle of identifying the person named. The authorities, we conceive, fully justify this position. (Price v. Page, 4 Ves. Jr. 680; Beaumont v. Fell, 2 P. Will. 140; Jackson v. Goes, 13 Johns. 578; Still v. Hoste, 6 Madd. 123; Miller v. Travers, 8 Bing. 248; Hiscocks v. Hiscocks, 5 Mees. & W. 370; Jackson v. Cody, 9 Cow. 147; Tucker v. Seamen's Aid Society, 7 Met. 188; Tudor v. Terrell, 2 Dana, 47; Abbott v. Massie, 3 Ves. 148; Thomas v. Stevens, 4 Johns. Ch. 307; Parsons v. Parsons, 1 Ves. Jr. 266; 1 Greenl. Ev. § 291, n. 4; 2 Phil. Ev., Cow. & H. notes, 4th ed. 761, 770-3; 1 Spence's Eq. Jur. 539.)

The case of Beaumont v. Fell, so far as it admitted the testator's declarations of intention, has been overruled; but so far as it sanctioned the admissibility of proper extrinsic evidence for the purpose of identifying the person named, when the words of the instrument came to be applied to the person, it seems to have been approved by nearly all the later authorities.

The matter is properly to be considered with reference to the

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nature of the instrument. It is peculiar to the land titles of this State, under the acts of Congress. It has been the policy of the courts to uphold these titles, and to give to the documentary evidence issued by the government under these acts all the effect that can reasonably be given to it, consistently with the rules of law and the general principles governing the admissibility of evidence. Precedents from other States furnish only remote analogies. General principles may serve as a guide. The cases refer to patents, deeds, wills, written contracts, or depositions.

The certificate may be likened, in some particular respect, to either of these things, but, strictly speaking, it is neither one nor the other of them. We are to consider, not what it is like, but what it is. It is simply a certificate in writing, under the hand of the recorder, issued by statute authority. It does not convey title; it is merely *prima facie* evidence of the existence of certain facts at a former date, and it may be rebutted or disproved by other competent evidence. (Gurno v. Janis, 6 Mo. 330; Montgomery v. Sandusky, 9 Mo. 705; Biehler v. Coonce, 9 Mo. 343; McGill v. Somers, 15 Mo. 86; Joyal v. Rippey, 19 Mo. 660; Soulard v. Allen, 18 Mo. 590; Soulard v. Clark, 19 Mo. 570.) When offered in evidence, it speaks like a witness or a deposition. It is not of the nature of best evidence, nor is it the only admissible evidence. The same facts may be proved by living witnesses, or by other competent evidence. The registry of certificates has been held equally admissible to prove the same facts. Here, the other evidence fails to prove all the necessary facts without the certificate. In such case it was regarded by Scott, J., as "the highest evidence of title which could emanate from the government;" no patent was required, and he said the title was "evidenced by the certificate of confirmation." The title passed by the act of 1812, *proprio vigore*; and unless this document be available the party loses his title. In its effect, therefore, it is equivalent, in this case, to a patent. Yet it is not a patent, nor a record on which a *scire facias* would lie. If the plaintiff can show that he was the person named and designated, why should he not have the benefit of this instrument? If a deposition had contained the same mistake, there could be no

question but that another witness or deposition would be admissible to correct the error.

As presented on this record, it is not the case of two claimants, of the same or different names. It is not the case of two different persons, both falling within the class contemplated, one of whom is correctly named and described, and the other not. It is not the case of taking away the title from the person in whom it is vested by the conveyance, and transferring it to another person in whom it is not vested by the conveyance as it is written. We cannot doubt that extrinsic evidence was admissible, when this document was offered in evidence, to show, first, that the man Louis Lacroix, under whom the defendant claimed, was not the person named and described; and second, to show further that the man Joseph Lacroix, under whom the plaintiff claimed, was in fact the person named and described in the instrument by the name of *Louis* Lacroix, and by his further designation as the claimant of this lot in the Grand Prairie common field of St. Louis before the recorder in 1825, under the acts of Congress, who had made proof of his claim to the satisfaction of that officer, and had received this certificate, which certifies the fact that he was confirmed in his claim by the act of 1812. As it was said by Scott, J., in the case of *The City of St. Louis v. Toney* (21 Mo. 255), it is "the right and claim to a lot inhabited, cultivated, or possessed, prior to the 20th December, 1803," that is confirmed by that act. None but a claimant of such a claim came within its purview. The verdict finds that the claimant was Joseph Lacroix.

The question of the admissibility of "Hunt's minutes" has been the subject of decision or comment in several cases. (*Gamache v. Pequignot*, 17 Mo. 310; *City v. Toney*, 21 Mo. 255; *Clark v. Hammerle*, 27 Mo. 71; 36 Mo. 639.) It has been held that they should not be read, against objection, as a deposition to prove the facts testified to by the witnesses therein. They do not appear to have been read for this purpose in this case. No exception is taken on that account. An attentive examination of the case will show that the admissibility of these records in any case must depend upon the general principles of

the law of evidence governing the relevancy or competency of the evidence on the issues to be tried between the parties. Like any other record or official document, it must be admissible to show what it contains; but whether or not what is contained is relevant or competent on the issues in the case, must be determined by the general rules of evidence. In *Gamache v. Pequinot* these minutes and the documents relating to the claim were excluded, on the ground that, as the recorder had omitted to enter the claim in his registry of certificates or list of claims proved, the law would draw the conclusion that the claim had not been proven to his satisfaction. There is no question here but that this claim of Lacroix had been registered as a claim proved and confirmed. In the minutes, in the registry, and in the certificate, the claim runs in the name of Louis Lacroix. The minutes show that a person named Joseph Lacroix was present before the recorder on the day when this claim was proved, and signed his name *Joseph Lacroix* to his deposition as a witness proving the claim of Pierre Barribeau (the witness that proved this claim), in which deposition the recorder had written the name of the deponent as *Louis Lacroix*, and that the boundaries of the two claims of Lacroix and Barribeau called for each other on the north and south. We are of the opinion that this context of the record was relevant and competent evidence on the issues in this case; it was properly to be weighed by the jury for what it was worth in connection with the other testimony. It appears that this document was admitted to be read to prove "notice of the claim, and for no other purpose," and that it was wholly excluded in the verdict rendered. The error, whatever it may have been, was an error against the plaintiff, of which the defendant cannot complain.

The other evidence, and especially the testimony of A. H. Evans, with this record before him, furnished proof that might well be deemed satisfactory, if not wholly irresistible, that the person who appeared before the recorder on that day, in company with Barribeau, and caused this claim to be proved by him as witness, and who signed his name *Joseph* to the deposition running in the name of *Louis* in support of Barribeau's claim, on the same day, was the man Joseph Lacroix, and that it was this person and no

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other who claimed and proved this lot and received this certificate in which his name was written *Louis* Lacroix by mistake. This proof must be held sufficient, unless the name is to be regarded as more important than the person designated—words as more important than the thing signified—*nihil facit error nominis, cum de corpore constat*.

The judgment will be affirmed. The other judges concur.

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THE COUNTY OF ST. LOUIS, Respondent, v. JOHN B. LIND and  
JAMES M. CLEMENS, JR., Appellants.

1. *County Court—Appeals from—Jurisdiction of Circuit Court.*—Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court, as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.
2. *County Court, appeal from—Action of the inferior court must be affirmed or reversed.*—The failure to find any error in the proceedings on such an appeal is not proper ground for dismissing the appeal. The question presented by the record should be passed upon by the Circuit Court.

*Appeal from St. Louis Circuit Court.*

*A. M. Gardner*, for appellants.

I. The appeal being regularly and properly taken for the purpose of a trial *de novo* in the Circuit Court, appellants were entitled to it. Appeals from the County Court are governed by the same rules as those from justices of the peace, in which the trials in the Circuit Court are *de novo*. (Gen. Stat. 1865, chap. 136, p. 550, § 2, fourth clause.) There is no express or separate provision in the statutes prescribing how appeals from the County Court shall be taken, or prosecuted when taken. Wherever referred to in the statutes, they are almost invariably joined with appeals from justices of the peace. The same language is applied



to both; the same rules as to taxation of costs and affirming the judgment. (Gen. Stat. 1865, chap. 173, pp. 688-9, §§ 14, 16.)

II. The County Court, although made by statute a court of record, has no common law jurisdiction, and a writ of error would not lie to it unless authorized by statute. Neither in practice nor by statute is there any way provided to preserve the testimony in the County Court any more than before a justice of the peace. No declaration of law is made by the court; no exceptions are preserved; no bill of exceptions could be made up or signed. An appeal, therefore, in the County Court, would, in almost every case, be impracticable and useless (especially where, as in this case, there was a trial before a jury, and testimony given), unless a trial *de novo* could be had. A writ of error would not lie to the County Court in a matter of probate. The case must be brought up in the usual way by appeal, and a trial *de novo* had in the appellate court. (N. Mo. R.R. Co. v. Green's Adm'r, 34 Mo. 159.) The statute makes no distinction in appeals from the orders or judgments of the County Court, whether made in probate or other matters. Trials *de novo* have been had on appeals from county courts. (Boggs v. Caldwell County, 28 Mo. 586; Walsh *et al.* v. Edmonson's Ex'r, 19 Mo. 142; County of Boone v. Corlew, 3 Mo. 12.)

H. A. Clover, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was a proceeding instituted under the provisions of section thirteen of an act entitled "An act about roads in St. Louis county," approved March 10, 1849. It was commenced in the County Court of St. Louis for the purpose of having a certain quarry, the property of James Clemens, Jr., condemned for the use of the county in repairing a certain road mentioned in the application. A jury was summoned, as the law required, and its action being approved by the County Court, an appeal to the Circuit Court was prosecuted by Clemens.

The only matter for consideration here is the correctness of an instruction given by the latter court and its order dismissing the appeal.

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The instruction reads as follows: "The court declares the law to be that, although an appeal may lie to the Circuit Court from a final order of the St. Louis County Court in proceedings had before said court under section 13 of an act about roads in St. Louis county, approved March 10, 1849, yet such appeal cannot authorize this court to try the matter *de novo*; and when such appeal is taken for the purpose of a *de novo* trial, and the record of the County Court shows no error, the appeal must be dismissed."

Upon the authority of the cases heretofore decided by this court, it would seem that the only effect of taking the appeal in this case was to take the record of the County Court up to the appellate court, just as a *certiorari* would. In the exercise of its appellate jurisdiction, the Circuit Court, without direct authority conferred by the statute, could not proceed to try the case upon the facts. (County of St. Louis v. Sparks, 11 Mo. 201; Lewis v. Nuckalls, 26 Mo. 278; Lacy v. Williams, 27 Mo. 280.)

Notwithstanding the fact that an appeal will lie in a case of this sort, it is clear that the Legislature has failed not only to authorize a trial *de novo*, which, all things considered, would seem to be the most reasonable and proper mode of proceeding, but has failed to provide for preserving the matters of exception that may arise in the progress of the trial by the lower court. The instruction, then, is correct in so far as it assumes the want of authority to try the case *de novo*. The appeal having no other effect than to take up the record of the County Court to the Circuit Court, the latter can go no further than to ascertain whether the inferior tribunal executed its jurisdiction, or in any respect proceeded illegally in reference to the subject matter before it.

The latter part of the instruction, however, assumes that where the appeal is taken for the purpose of a trial *de novo*, and the record shows no error, it must be dismissed. There was no finding by the court as to the matters properly presented by the appeal, but it seems to have been taken for granted that there was no error in the record of the County Court, and an order was thereupon made dismissing the appeal.

This was improper. Although the appellant may have insisted

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upon such a trial in the Circuit Court, still it ought not to be assumed that that was the only purpose for which the appeal had been taken. There was no objection to the manner of taking the appeal, and the record seems to have been properly before the court for all the purposes contemplated by law, and the judgment of the County Court should either have been affirmed or reversed. The failure to find any error in the proceedings was not proper ground for dismissing the appeal. The appellant had a right to insist upon having the questions presented by the record passed upon by the Circuit Court.

The judgment of the Circuit Court will therefore be reversed and the cause remanded. The other judges concur.

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HENRY KRATZ, Respondent, v. VALENTINE STOCKE and JOHN FAUDI, Appellants.

1. *Promissory Note—Parol Contract, when valid consideration—Statute of Frauds.*—Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for \$1000, and in pursuance of this arrangement the property was conveyed to defendants: *held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker, notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.
2. *Contracts, executed and executory.*—Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.

*Appeal from St. Louis Circuit Court.*

Defendants asked the following among other instructions, which were refused by the court:

1. If the jury believe and find from the evidence that the consideration for the making and indorsing of the note sued upon was

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the transferring by the plaintiff to the defendants of a bargain or agreement had by the plaintiff and one Henry Shenkel with Mrs. Elizabeth Timmerman, for the purchase and sale of the interest of her deceased husband in and to the Star mills, as set out in plaintiff's reply to defendants' answer; and that said bargain or agreement was a mere verbal contract between Mrs. Timmerman and the plaintiff, or plaintiff and Shenkel, and which was not, nor a memorandum thereof, reduced to writing and signed, so as to make the same a valid and binding contract, within the statute of frauds, upon the parties, then there was no valid consideration in law for the making and indorsing of said note, and the plaintiff cannot recover in the action.

2. The transferring to another a bargain for the purchase of lands, or interest in or concerning the same, is not a good consideration of a note for the payment of money.

3. Unless the alleged sale of the Star mills to plaintiff and Shenkel, as averred in the pleading of the plaintiff, was an actual sale thereof, or a contract for sale, on the part of Mrs. Timmerman, binding upon her by reason of there having been a compliance with the statute of frauds—that is to say, by reason of there having been an agreement for such sale, or some memorandum or note thereof in writing, and signed by her or by her lawful authority—then there was no good consideration for the making and indorsing of the note sued on, and thereupon the plaintiff cannot recover on the note sued on.

4. Unless the sale to plaintiff and Shenkel of the Star mills by Mrs. Timmerman, as averred in the plaintiff's petition, was an executed sale, or an agreement for sale, valid and binding on Mrs. Timmerman, then the plaintiff cannot recover; and the court instructs the jury that there is no evidence in the cause rebutting defendants' evidence that there was no such sale or valid agreement for such sale; and if the jury believe the whole evidence in the cause upon this point, the plaintiff cannot recover.

The court gave one instruction at the instance of the plaintiff, containing simply the converse of the proposition sought to be maintained in the defendants' instructions.

The facts appear sufficiently in the opinion of the court.

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*Jecko & Clover*, for appellants.

I. The transferring to another a bargain for the purchase of lands, or interest in or concerning the same, is not a good consideration for a note for the payment of money. (Chit. on Cont. 43; *Price v. Seaman*, 7 Dowl. & Ryl. 14; 4 Barn. & Cres. 525; 2 Bing. 487; 10 Moore, 37; *Ehle v. Judson*, 24 Wend. 97.) A merely moral or conscientious obligation, unconnected with any prior or equitable claim, is not enough to support the promise. (3 Bos. & Pull. 249, *n.*; *Smith v. Ware*, 13 Johns. 257; *Lowe's Plead. Assump.* 54; 16 Johns. 283, *n.*)

*Lazar & Madill*, for respondent.

I. Defendants cannot, in this case, resort to the statute of frauds to establish a want of consideration, inasmuch as they did not plead it in bar of the action. (*Wildbahn v. Robidoux*, 11 Mo. 659; 28 Cal. 632; 2 Story's Eq. Jur. § 756-7.)

II. But admitting that they might avail themselves of the statute, although they have failed to plead it, they cannot now invoke its aid. If the promise of the plaintiff, which was to form the consideration of defendants' note, was, when made, within the statute of frauds, it has been taken out of its operation by its having been fully executed. (*Suggett's Adm'r v. Cason's Adm'r*, 26 Mo. 221; *Lobdell v. Lobdell*, 36 N. Y. 331; *Abbot v. Draper*, 4 Denio, 51; *Thomas v. Dickinson*, 12 N. Y. 364.)

III. Plaintiff agreed to abandon his claim in favor of the defendants and endeavor to procure their substitution as purchasers. He kept his agreement, abandoned his contract of purchase in favor of the defendants, procured their acceptance as purchasers, gave up the opportunity to reimburse himself for the expense he had been to in closing up his business by accepting this property. This was an injury to him, and, with his efforts in procuring the substitution of the defendants as purchasers, constitutes a sufficient consideration to support the notes given by the defendants. (33 Barb. 294; 8 Mo. 675; 38 Mo. 147; 2 Watts, 104.)

Even if the note was given in consideration of the sale of a



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parol agreement for an interest in land, still the weight of authority is decidedly against the defense relied on. (*Hardwick v. Blanchard*, Gow's R. 109; *Seaman v. Price*, 10 Moore, 34; 2 Edw. Ch. 514; *Trask v. Vinson*, 20 Pick. 105, 111; *Abell v. Douglass*, 4 Denio, 305, 311; *Horner v. Wood*, 15 Barb. 371; *Hasford v. Carter*, 10 Abbott, 432; *Sandford v. Morris*, 34 N. Y. 315.) In the case of *Ehle v. Judson*, 24 Wend. 97, the plaintiff's assignor had made no parol contract for the purchase of the farm of Blatherwick, so that there was not even an obligation of honor resting upon Blatherwick to convey the same. The plaintiff's assignor was to do nothing after the making of the agreement, whereas in the case at bar the plaintiff was to assist in procuring the defendants' substitution as purchasers in his stead. The consideration of the note in the case referred to was the time and trouble expended by the plaintiff's assignor prior to its execution. It was exclusively an executed one, whereas in the case at bar the plaintiff was, after the execution, still to render and did render valuable services.

WAGNER, Judge, delivered the opinion of the court.

This action was brought upon a promissory note for one thousand dollars, made by the defendant, Stocke, payable to the order of defendant, Faudi, and indorsed by the latter. The answer admits the execution and indorsement of the note, and its delivery to and ownership by the plaintiff, but alleges that it was procured by the fraud and misrepresentation of the plaintiff, and that it had no consideration to support it. The reply traverses these allegations of fraud and want of consideration, and sets forth in full the transactions out of which the note sprang.

The facts seem to be briefly these: The defendant, Stocke, and one Jacob Timmerman were copartners, and, as such, were the owners of a certain leasehold, situated in the city of St. Louis, whereon was erected a flouring mill, known as the Star mills. Timmerman died, and his wife administered on the estate, and by an order of the Probate Court she was authorized to sell the mill at private sale. The agent of the administratrix

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entered into negotiations with plaintiffs for the sale of the mill, concluded a contract and fixed upon a price, and gave orders to the attorney for the administratrix to draw up a conveyance to be executed by her. The agreement was wholly verbal, no writing having passed between the parties. Subsequently the defendants, ascertaining that plaintiff had purchased the property, were anxious to procure the same, and after considerable negotiations agreed to give him two thousand dollars if he would permit the defendants to become the purchasers and use his influence to secure their substitution, and allow the conveyance to be made to them instead of the plaintiff. This was finally agreed to, and the defendants executed two promissory notes for one thousand dollars each, one of which notes is the foundation of this suit.\* The agent was then notified of the transaction and requested to accept the defendants instead of the plaintiff, and the sale was carried out in pursuance of this arrangement, and the property conveyed to the defendants by the administratrix.

There does not appear to be anything to support the allegation that the note was procured by fraud and misrepresentation, and the main point relied on by the counsel for the plaintiff is that the original contract or agreement for the purchase of the property by the plaintiff from the administratrix, not being in writing, was void by the statute of frauds, and therefore furnishes no consideration to support the promise of the defendants. An assignment of a debt or a right is a good consideration for a promise by the assignee. The validity of the transfer will always be upheld if the assignee obtains a benefit which the law considers a sufficient and proper consideration to found a promise upon.

An injury to the party to whom the promise is made, or a benefit to the party promising, has been universally held a sufficient consideration. Mr. Chitty, in speaking on the subject, says that the main rule in regard to the sufficiency of the consideration seems to be that it may arise either, first, by reason of a benefit resulting to the party promising, or, at his request, to a

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\* It appears that one Shenkel had negotiated jointly with plaintiff for the purchase of the property, and one note for one thousand dollars was delivered to the former.

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third person, by the act of the promise; secondly, on occasion of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, at the instance of the person making the promise, although such person obtain no advantage therefrom. (Chit. on Cont. 30.)

The assignment of the advantages to be derived by the contract for the purchase of the mill, in the present case, was a sufficient consideration and binding on the promisor, unless the action can be defeated by interposing the statute of frauds. The appellants' counsel relies on two cases to support his view of the law—Price v. Seaman, 4 Barn. & Cres. 525, and Ehle v. Judson, 24 Wend. 97.

The case of Price v. Seaman was first decided in the Court of Common Pleas, and will be found reported in 10 Moore, 34, and 2 Bing. 437, and was thence carried by writ of error into the King's Bench. The case is precisely in point, the facts being essentially the same with the one at bar. In the Common Pleas the court unanimously overruled the defense, and held the defendant bound by his promise—Best, C. J., who delivered the opinion, saying: "Although it has been objected that none of the counts in the declaration can be supported, the fourth was clearly proved, and is of itself sufficient to entitle the plaintiff to recover, as it is therein alleged that he relinquished his bargain and gave the defendant an opportunity of becoming the purchaser." (10 Moore, 83.)

In the King's Bench the court does not undertake to overrule the judgment of the Common Pleas, but the opinion is placed upon a different ground, that the declaration must be presumed good after verdict. The Chief Justice remarked: "The plaintiff, in his declaration, has alleged that he had bargained and agreed with one J. E. for the purchase of certain freehold houses. We must take that to mean that he had made a valid bargain, and, as a writing is essential to the validity of such a bargain, it must, after verdict, be presumed to have been in writing." The point was distinctly made by both counsel in both courts, that there was no consideration for want of a writing.

The case of Ehle v. Judson, 24 Wend. 97, is, at first blush, a

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strong authority for the appellants, but upon a more close and minute examination may be distinguished from the present case. There the action was by the plaintiff as the holder of a note payable to Elisha Swift or bearer, for the sum of one hundred dollars, transferred after maturity. The defense set up was want of consideration. The defendant had been in negotiation with one Blatherwick for the purchase of a farm, but, not agreeing as to the price and terms of payment, abandoned the negotiation. Elisha Swift then treated with Blatherwick for the purchase of the farm on his own account, and induced Blatherwick to accept from him a less sum, and also to reduce the amount of the cash payment to be made on the conveyance of the property. Swift told Blatherwick that he thought he should take the farm. The agreement was by parol. In this state of the negotiation, Judson, the defendant in the cause, solicited Swift to give up his bargain and consent to his becoming the purchaser upon the terms which Blatherwick had agreed to accept from him. The latter assented to the proposition, provided Judson would give him his note for one hundred dollars to pay him for his time and trouble in negotiating his purchase. Judson accordingly gave the note and became the purchaser of the farm. Upon this state of facts, the Circuit Court rendered judgment for the plaintiff. The cause was then taken to the Supreme Court, and the judgment reversed. Bronson, J., in his opinion, said the note was given on a past or executed consideration. It was to compensate Swift for what he had done in negotiating for the farm and obtaining the offer of better terms than Blatherwick had proposed to accept when the defendant was in treaty for the purchase. He was unable to see how that made out a good consideration for the promise. Swift had not acted for the defendant, but for himself. If a verbal contract had been completed, it would have been void under the statute of frauds. But he had not even made a void contract, if such an expression could be tolerated. He had only got an offer of terms from Blatherwick, and had told him he *thought* he should take the farm. The owner was under no obligation, not even in honor, to sell upon those terms, or to give Swift a preference over any other person on whatever terms he might ultimately conclude to part with his

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property. In that case not even a moral obligation arose. Swift said he thought he would take the property, but no definite agreement or understanding was arrived at. The consideration was for the negotiation or treaty, which was past and executed, without any request, and nothing more was provided to be done. Here a new consideration springs up after the terms were fixed and agreed upon between the plaintiff and Mrs. Timmerman's agent. The defendants not only get an assignment or transfer of the plaintiff's bargain, but they employ and request him to procure the defendants to be substituted in his place, which he did accordingly.

In the case in Wendell, the promise originated wholly out of a transaction past and executed; here, in addition to the executed contract, an executory contract arises.

In *Trask v. Vinson*, 20 Pick. 105, the doctrine laid down in *Price v. Seaman*, in the Common Bench, is approved and the case quoted with approbation. A similar ruling is made in *Bailey v. Le Roy*, 2 Edw. Ch. 514, and this view of the law is cited as authority and approved by Mr. Addison in his valuable treatise on contracts. (Addison on Cont. 18-30.)

Now, although a parol contract for the sale of real estate is by the statute made void, it is not illegal. The Legislature, for purposes of public policy, have seen fit to require a writing to evidence the sale of lands. Yet if this mode is not pursued the contract is neither wicked nor corrupt, and the parties may waive the statutory provision if they will. The objection would unquestionably have been fatal if the action had been prosecuted on the original contract against Mrs. Timmerman, the administratrix, for specific performance. She could have pleaded the statute, and it would have been a complete and perfect bar, though she would not have been bound to plead it; and the facts show that she did not plead it, but executed the contract. The assignment of the contract, and getting the defendants substituted instead of the plaintiff, and procuring the conveyance to be made to them, constitutes the consideration of the defendants' engagement, whence they derived a substantial benefit and advantage.

If the contract had turned out to be inoperative, and the administratrix had refused to convey, then the consideration would have



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failed, and no action would have accrued. But such is not the fact. The estate has been conveyed in pursuance of the agreement. The defendants accepted the title which they acquired by virtue of that agreement, and no reason is perceived why they should not be held to abide by their stipulation. It follows, therefore, that the instruction given by the court at the instance of the plaintiff was correct; and the instructions asked by the defendants, which asserted the converse of the proposition contained in the instruction given, were rightfully refused.

The judgment will be affirmed. The other judges concur.

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JOHN P. BRIDLE and CHARLES S. FITCH, Respondents, v. JACOB GRAU, Appellant.

1. *Justice's Court—Trial—Consolidation of Suits.*—The action of a justice of the peace in consolidating different suits is improper if thereby the amount in controversy will be increased beyond the jurisdiction of the justice, even where they are brought by plaintiff against the same defendant, and are based upon causes of action which, under the statute, may be joined and determined in the same suit.
2. *Justice's Court—Jurisdiction.*—But where judgment is rendered for an amount within the jurisdiction of the justice, without exception on the part of plaintiff, it will be permitted to stand for that amount, notwithstanding such order of consolidation.
3. *Justice's Court—Appeal—Amount of Judgment.*—Upon appeal trial in, the Circuit Court, judgment for a larger sum than that within the jurisdiction of the Justice's Court is erroneous.

*Appeal from St. Louis Circuit Court.*

*Haeussler*, for appellant.

I. After the consolidation there was but one cause, and it should have been dismissed as being for a sum greater than the jurisdiction of a justice's court; and nothing that defendant did, either before the justice or the court below, could give jurisdiction.

II. Plaintiffs should have brought this suit in the proper court having jurisdiction, or should have given a voluntary credit so as to reduce the amount. This they failed to do, and they certainly had no right to split their account. If this were allowed nearly

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half the cases brought in this court could be so split up and a person annoyed with a dozen of these petty suits, and certainly the law never contemplated any such thing. (Sykes v. Planters' House, 7 Mo. 477; Wagner v. Jacoby, 26 Mo. 532; Smith v. Jones, 15 Johns. 229, *n.*; Willard v. Sperry, 16 Johns. 121, *n.*; Witherell v. Inhabitants, etc., 5 Blackf. 357; Alex v. Peck, *id.* 308; Swift v. Woods, *id.* 97.)

*Hospes*, for respondents.

FAGG, Judge, delivered the opinion of the court.

The respondents, publishers of a paper in the city of St. Louis called "The Daily Western Stage," instituted two suits by attachment before a justice of the peace against the appellant, each founded upon an account for advertising. One, for the sum of ninety dollars, was commenced on the 31st day of January, 1867; and the other, for twenty-nine dollars, on the 2d day of February following. These suits were consolidated by the justice, on motion of the defendant. An additional motion to dismiss the cause thus consolidated, for want of jurisdiction, was overruled, and upon a trial judgment was given for plaintiffs in the sum of ninety dollars. An appeal was taken by the defendant to the Circuit Court of St. Louis county, where a similar motion to dismiss for want of jurisdiction was made and overruled. The cause was then tried *de novo*, and a verdict being found by the court sitting as a jury for the amount of both accounts, judgment entered accordingly, and an appeal duly prosecuted to this court.

It is manifest that the order of the justice to consolidate the two suits was improper. In a case where more than one suit has been brought by a plaintiff against the same defendant, and they are based upon causes of action which, under the provisions of the statute, may be joined and determined in the same suit, it is expressly provided that they shall not be consolidated if thereby the amount in controversy will be increased beyond the jurisdiction of the justice. The effect of the consolidation in this case was to make the whole amount claimed exceed his jurisdiction. Notwithstanding the action of the justice upon the motion to consolidate,

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the amount for which judgment was actually rendered was within his jurisdiction.

Whether that was the precise amount found on the trial, or whether a larger sum was ascertained to be due, and the plaintiffs remitted and released so much as exceeded the jurisdiction of the justice, does not appear from the transcript. There was no appeal taken from the judgment of the justice by the plaintiffs, and it may very well be assumed that the excess was remitted. At all events, they seem to have been satisfied with the amount of the judgment rendered, and the Circuit Court ought not to have gone beyond it.

The error of the court below, then, was simply in rendering a judgment for a larger sum than the amount shown by the transcript of the justice; that will be corrected by entering judgment here for the sum of ninety dollars, with costs.

The judgment of the Circuit Court, rendered at general term, will be reversed, and judgment given for respondents for the sum above stated. The other judges concur.

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THE HOME OF THE FRIENDLESS, Defendant in Error, v. EDWARD S. ROWSE, Collector of the Revenue of St. Louis County, Plaintiff in Error.

1. Case of Washington University v. Rowse, *ante*, p. 308, affirmed.

*Appeal from St. Louis Circuit Court.*

*Hitchcock & Lubke*, for defendant in error.

*Clover*, and *R. F. Wingate*, Attorney-General, for plaintiff in error.

WAGNER, Judge, delivered the opinion of the court.

This case is similar in all respects to the case of Washington University v. Rowse, decided at the present term; and, for the reasons given in the opinion in that case, the judgment of the Circuit Court will be reversed and the petition dismissed. The other judges concur.

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Quinlivan et al. v. English.

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EDWARD QUINLIVAN, AND ANNIE WILLIAMSON, BY HER NEXT FRIEND FREDERICK WILLIAMSON, Appellants, v. EZRA O. ENGLISH, JR., Respondent.

1. *Partnership Settlements—Outgoing Partner—Purchase of share of.*—Where the mode of partnership settlement and division of the partnership property that is provided in the articles becomes impracticable, or can not be fairly carried into effect, courts may order a sale of the property; but effect will be given to a stipulation that one or more of the parties shall be entitled to purchase the share of the outgoing partner at a valuation.

*Appeal from St. Louis Circuit Court.*

The eleventh article of the partnership agreement, the meaning and effect of which is a point in dispute in the case, was in the words following, viz: "That in case of the death of any of the said partners, violation of any of the articles of this agreement, or other dissolution of this partnership, a general account of stock shall be taken, in writing, as before provided, and the balance due such deceased or outgoing partner or partners ascertained, and such balance paid such outgoing partner or the representatives of such deceased partner as follows: One-third of such balance in one month from such dissolution or death, and notes of the continuing partner or partners at one and two years' time for the other two-thirds; said notes to be secured by deed of trust on the property of said concern, or otherwise, as may be agreed upon, and shall bear interest at the rate of six per cent. per annum."

The facts are sufficiently set forth in the opinion of the court.

*Dryden & Lindley*, for appellants.

I. Each partner has the right, as a matter of law, to have the partnership effects applied to the discharge and payment of all the partnership debts and liabilities before any one of the copartners can claim any right or title thereto. (Story on Part. §§ 97, 326, 441; 3 Kent's Com. § 65; *Dyer v. Clark*, 5 Met. 575; *Nicholl v. Mumford*, 4 Johns. Ch. 525; *Rodriguez v. Heferman*, 5 *id.* 428.)

II. The interest of a partner in the partnership effects is his

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share of the surplus after paying the partnership debts and liabilities. (Story on Part. § 97; Dyer v. Clark's Adm'r, etc., 5 Met. 575; Nicholl v. Mumford, 4 Johns. Ch. 525; Rodriguez v. Hefferman, 5 *id.* 428.)

III. The office of the eleventh article of the partnership agreement was merely to furnish a rule for the distribution of the surplus among the partners, and had no operation except on the surplus after the payment of the partnership debts. Hence, the Circuit Court manifestly erred in refusing to entertain jurisdiction of this case and enforce the payment of the partnership debts out of the partnership property. If this suit cannot be maintained, then, so far as the enforcement of the payment of the partnership debts is concerned, the plaintiffs are without remedy, for the eleventh article of the partnership agreement furnishes no remedy for this injury.

IV. The respondent had no right to use or dispose of the partnership property after dissolution, otherwise than for the purpose of closing up the business of the concern, until he had first complied with the requirements of said eleventh article.

*Mauro & Madill*, for respondent.

I. Article eleven of the agreement of copartnership specifies, in the event of dissolution, the method of ascertaining the value of the effects of the copartnership and the extent of its liabilities, and determines the disposition which should be made of its property, and the terms of the payment of the purchase money. If its provisions be enforced, the plaintiffs being the outgoing partners, the defendant was entitled to retain the property upon complying with the provisions of this article respecting the purchase money therefor. And a court of equity will not interfere for any purpose other than to enforce a compliance with the requirements of this article, unless its execution be impracticable, or the defendant refused, upon reasonable request, to comply with its provisions. (Leach v. Leach, 18 Pick. 68; Story on Part. § 207; Pars. on Part. 301; Col. on Part. p. 297, § 313; Wilson v. Greenwood, 1 Swant. Ch. R. 471; 8 Simons, 532; Law v. Ford, 2 Paige Ch. 310.)



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II. But plaintiff, aside from article eleven, has not established by the evidence a proper case to warrant a court of equity to interpose even by entertaining an action for an accounting. The simple fact that a dissolution by agreement was had did not authorize the plaintiffs, as a matter of course, to resort to this action of accounting. This is only to be done when the parties are unable or some of them are unwilling or refuse to account. There was certainly no ground whatever for an injunction and receiver. The petition alleges the solvency of the firm, and the evidence establishes it. A mere apprehension that the defendant might misapply the funds, or waste the property of the partnership, is no ground for interference by injunction. (Coll. on Part. p. 315, § 343; Woodward v. Schatzell, 3 Johns. Ch. R. 412-415.) Nor will a receiver be appointed simply because there has been a dissolution of the partnership. There must be some breach of duty as a partner, or of the contract of partnership. (Henn v. Walsh, 2 Edw. Ch. R. 129; Harding v. Glover, 18 Ves. Jr. 280; Coll. on Part. p. 322, § 354.)

III. Plaintiffs were each indebted to the partnership at the time of filing their petition; and they could not insist upon an account without paying this amount into court. (Coll. on Part. p. 267, § 301.)

IV. The solvency of this firm being alleged in the petition and established by the proofs, the creditors of the firm have no equity or lien calling for the payment of their debts which they can enforce. It is the partner, and the partner alone, who has this equity or lien, and at his instance only can it be enforced when the firm is solvent. And the partner of a solvent firm may sell to his copartner his entire interest, and the vendee takes it entirely relieved, not only from any supposed equity in favor of firm creditors, but also from the equity of the vendor to have firm debts paid out of firm property. (Sage v. Chollar, 21 Barb. 596, and authorities there cited; also, 3 Ired. Ch. R. 213.) Hence, he may bind himself by agreement before dissolution to do it on the happening of that event, and a court of equity will not interfere to enable him to violate the faith of his solemn engagements.

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HOLMES, Judge, delivered the opinion of the court.

The plaintiffs filed their bill in equity, after a dissolution by consent of the partnership subsisting between the parties, praying for an injunction, a receiver, an account, and a sale of the partnership effects, for the purpose of winding up the concern. The articles of partnership contained a stipulation that in case of the dissolution of the partnership by the decease of a partner, or by a violation of the agreement, or otherwise, a general account of stock should be taken, and that the interest of the outgoing partner, being ascertained by agreement or by arbitration, should be paid over to him, one-third in one month, and the other two-thirds in one and two years, and to be secured by notes and a deed of trust on the property of the concern, or otherwise, as might be agreed upon. The plaintiff Quinlivan retired, and the defendant retained the possession of the property and continued the business. It appears that the parties did not agree upon any mode of carrying the stipulation into effect, nor was a reasonable time allowed for that purpose before the filing of this bill. An injunction was granted and a receiver appointed. Upon the hearing, the injunction was dissolved and the bill dismissed.

It is insisted for the plaintiffs that they were entitled to the relief prayed, or at least that the bill should have been retained for the purpose of taking an account and ordering a sale of the property to ascertain the interest of the plaintiffs and wind up the concern. The defendant insisted that he had been always ready to comply with the articles, and that he was entitled to have the matter settled upon the terms of the stipulation, and that there was no equity for relief in the case.

It does not appear that the defendant had been guilty of any violation of the articles or of any breach of contract or duty, nor that any reasonable attempt had been made to adjust the matter according to the stipulation or to refer the subject of dispute to arbitration, nor that there was any urgent occasion for an injunction, or any necessity for the appointment of a receiver; but a receiver was appointed, who still has charge of the property. We think there was no case to warrant an injunction or a receiver.

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(Story on Part. §§ 228, 330 ; Henn v. Walsh, 2 Edw. Ch. 129 ; Harding v. Glover, 18 Ves. Jr. 281.)

It is true (as contended by the plaintiffs) that the interest of a partner is his balance of account, or share of the surplus, after the debts have been paid and the affairs of the concern have been wound up. At the same time, the stipulations of the articles of partnership are to be carried into effect so far as it can practically be done. Where the mode of settlement and division of the partnership property that is provided in the articles becomes impracticable, or cannot be fairly carried into effect, the court may order a sale of the property ; but effect will be given to a stipulation that one or more of the parties shall be entitled to purchase the share of the outgoing partner at a valuation. (Story on Part. § 207.) It appears that this property consists of a brewery and stock employed in the business of brewing ale. The plaintiff had consented to retire and allow the defendant to retain the property and continue the business. After this lapse of time the mode of payment agreed on has become impracticable, or cannot now be fairly enforced, but the stipulation can still be made effectual so far as to allow the defendant to keep the possession of the property and effects at a valuation. If he should decline to do this, or if it should appear to have become impracticable, there is no doubt that, in such case, the court might decree a sale of the property for the purpose of winding up the concern. (Collier on Part. § 312-13.)

Upon the facts appearing in the case, we are of the opinion that the court should have retained the bill and proceeded to have an account taken and stated, upon the basis of allowing the defendant to receive and retain the property to his own use at a valuation, and to ascertain the balance of account due the plaintiffs, for which they would be entitled to judgment against the defendant. The receiver may be ordered to deliver the possession of the property to the defendant, upon his agreeing to take the same at a valuation to be settled and fixed by a master or referee ; otherwise the property to be sold and accounted for by the receiver.

The judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion. The other judges concur.

JACOB M. BIXLER, Plaintiff in Error, v. JOHN HAGAN AND MARY  
HAGAN, Defendants in Error.

1. *City Ordinance—Market Stand—Paving Contract—Who liable for—Construction of Statute.*—The city of St. Louis is not the "occupant" of that portion of a street which has been set apart by ordinance as a stand for market-wagons during certain hours of the day, within the meaning of the ordinance relating to the engineer department (Rev. Ord. 1866, p. 329, § 21), and the owners of property fronting on portions of streets so set apart are liable to a contractor with the city of St. Louis, upon a certified tax bill, for cost of repaving the same.
2. *City Ordinance—Paving Contract—City, when liable for as "occupant of property," etc.*—The city of St. Louis becomes chargeable for expense of repaving, "as owner or occupant of property," within the meaning of the twenty-first section of that ordinance, only when "owner or occupant" fronting upon the street sought to be repaved. (Same ordinance, § 18.)

*Error to St. Louis Circuit Court.*

This was an action brought in the St. Louis Circuit Court to enforce payment of a special tax bill under a street-paving contract.

The petition states that defendants were and are owners of a lot on the east side of Broadway, between Morgan and Cherry streets; that the plaintiff was contractor for paving Broadway with wooden pavement in front of the lot of defendants and of others; that the work was done and a special tax bill given by the city engineer to the plaintiff against the defendants for the sum of \$318.12, and that the defendants refuse to pay the same.

Defendants' answer, after traversing several of the allegations of the petition, set up new matter of defense, as follows: And these defendants, further answering, state that under and by virtue of the ordinance whereby it is alleged that the said pavement was authorized to be laid, it is provided that, "whenever the city of St. Louis, as the owner or occupant of property, shall become charged with the cost of any work done under the provisions of certain sections of said ordinance relating to the laying of wooden pavement (under which said provisions of said section the work mentioned in plaintiff's petition was done), the auditor shall pay the same and charge it to appropriations for streets and alleys."

And defendants further say that, by the provisions of said ordinance, no private property can be assessed for paving streets, such as in said petition alleged and specified, unless such private property adjoin and is adjacent to the street thus improved, and which is used or allowed and permitted to be used and employed by the leave and authority of the said city as a public thoroughfare. And defendants state that, by an ordinance of the common council of the city of St. Louis in relation to markets, it is provided in section two thereof "that all that portion of Broadway south of Carr street, and the sidewalks of Broadway from Morgan to Biddle street, shall constitute and be known as the North Market;" to which said portion of Broadway and the said sidewalks the said property of these defendants adjoins. And by the third section of said ordinance it is provided that "all that portion of Broadway, on either side thereof and next to the sidewalk, which lies between Morgan street and Carr street, along the curbstone, be and the same is hereby set apart as stands for farmers' wagons, and considered a part of the North Market, coming under the rules and regulations of said market and the supervision of the market-master;" to which said portion of Broadway the property of these defendants adjoins, said Broadway being sixty feet wide from curb to curb. And by the ninth section of said ordinance it is declared that the said stands referred to as occupied "shall not occupy a greater space along the curbstone than eight feet, and extending from the same three and a half feet deep." And in article 5, section 1, of said ordinance, it is provided that "the market aforesaid (meaning that hereinbefore alluded to) shall be open for the sale of all victuals and provisions from the dawn of day until nine o'clock A. M., and from four o'clock P. M. until dark, from the first day of April until the first day of October; and from the dawn of day until eleven o'clock A. M., and from two o'clock P. M. until dark, during the remainder of the year; and on Saturday of each week throughout the year the same shall be open until ten o'clock P. M."

And these defendants allege that, under and by virtue of the ordinance aforesaid, a section or strip of land some eleven feet or more in width, and being immediately in front of and adjacent



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to the said property of these defendants, and severing and separating the said property of these defendants from that portion of the said Broadway that is used as a public thoroughfare, and upon which said pavement is alleged to have been made and laid, is now and for many years past has been the property of, and under the sole and exclusive use, control, occupancy, and possession of, the said city of St. Louis; and that the said city, by and through its agents, servants, and lessees, has used, employed, and occupied the said section or strip of land for stalls, stands, or booths, for the keeping and vending, in the same manner and under the restrictions heretofore referred to, of goods and produce; and for the use and occupancy of the said strip or section of land the said city of St. Louis received a fixed and large revenue and profit; and the said city claims and exercises the right to the sole and exclusive use, enjoyment, and occupation of said strip of land for the purposes aforesaid, whereby these defendants are deprived and precluded from the use of the street which adjoins this said property in connection therewith; wherefore defendants say that they are not legally or equitably chargeable with any portion of the costs of said paving, but that the same is chargeable alone to the city of St. Louis, by virtue of the premises aforesaid and the ordinances in such case made and provided. And so these defendants asked to be dismissed, with costs of suit in this behalf expressed.

To which answer the plaintiff demurred, for the following reasons: 1. Because the allegations therein contained constitute no grounds of defense to plaintiff's demand. 2. Because it appears by said allegations that the defendants are owners of the land described in plaintiff's petition. 3. Because said allegations do not show an ownership or occupation of the property by the city of St. Louis such as will make the city chargeable with the cost of paving of said street. 4. Because said allegations state that the city occupies for a part of the day a portion of the street, and that it does not own or occupy any portion of the ground fronting upon said street and described in plaintiff's petition.

The court overruled the demurrer. The plaintiff declined to withdraw the demurrer; and when the case was called at special

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term for trial, the new matter set up in the answer was taken as confessed, and judgment rendered for the defendants. On appeal to the general term, this judgment was affirmed. The case comes into this court by writ of error.

*R. M. Field, and A. N. Sterling, for plaintiff in error.*

The plaintiff in error makes two points: 1. That the city had competent authority to establish a market-place upon a portion of Broadway, as set forth in the defendants' answer. 2. That if the action of the city in this respect was unauthorized and illegal, it would constitute no defense to the present suit, but the defendants must seek a remedy for any injury they have sustained in a direct suit against the city or its officers.

I. The city charter of 1839 confers upon the city council power "to erect market-houses, establish markets and market-places, and provide for the government and regulation thereof." The same power is conferred in all subsequent charters. In the same year an ordinance was adopted by the council, in relation to markets, which may be found in the revised ordinances of 1843, p. 242. By this ordinance the Center Market was established at the foot of Market street, and was to include the adjoining sidewalks, and the sidewalks and carriage-way on Front street, between Market and Chestnut streets. North Market, which is the same now in question, was to include Broadway as far north of Morgan street as might be necessary to accommodate persons attending the market. In like manner, South Market was to include Fifth street as far south of Labadie street as might be necessary for the same purpose. The ordinance subjects these market-places to the control of public officers, and prescribes suitable regulations by which the interests of all parties are protected, and particularly that the use of the streets as thoroughfares should not be obstructed. Since the date of that ordinance some of the markets have been abolished and a great many new ones have been established. The general principle of the ordinance of 1839, that portions of the streets and sidewalks, under proper regulations, may be used for market purposes, has never been departed from. The latest ordinance on the subject will be found in the revised ordinances of

1866, p. 460. It will be seen that the right of the city to do the acts that are set up in the answer as an unwarrantable appropriation of a public street has been exercised by the city thirty years, and, so far as is known, without dispute or complaint. What has been done by the city may be vindicated under the general police powers over the streets and thoroughfares. The farmer who brings his produce from the country is entitled to use the public streets, and in the absence of any regulation might seek a purchaser wherever he pleased. Much confusion and inconvenience would result from such a state of things. The city authorities have therefore wisely appointed stands for those who visit the city with loads of produce. The wagons containing hay or grain are assigned to particular places, those of wood and coal to other places, and even the city drivers of hacks, baggage-wagons, and furniture-cars, have their appointed places. Such regulations are everywhere adopted, and, in fact, are indispensable to good order in a populous city. Nor is the use of a street restricted to such purposes as relate to travel. The public may use it for purposes of general convenience, although travel may be somewhat incommoded or even temporarily suspended. On this principle sewers may be constructed, and gas and water pipes laid down in streets. (*Kelsey v. King*, 32 Barb. 410; *Gaslight Co. v. Gas Co.* 25 Conn. 19; *West v. Bancroft*, 32 Verm. 367.) It affirmatively appears in the answer that the travel along Broadway was not obstructed by the use of a portion of it as a market-place, and it seems that a passage-way forty-four feet in width was not affected at all by the ordinance in relation to markets.

II. If the city authorities have applied some part or the whole of Broadway to purposes inconsistent with its use as a street, this would be no defense to present action. For such abuses the remedy is by indictment or action by the party aggrieved. It is not questioned that the city or its officers would be liable to the defendants for any injury sustained by the latter through the misappropriation of the street by the former. If, then, in fact, the city has abused its power in this particular case, or if it had no authority under its charter to pass the ordinance or do the acts stated in the answer, and the defendants have suffered damage,

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it is not denied that they may maintain an action against the city. But it is insisted that they have no right to set off their damages against the plaintiff in the present suit.

*Cline, Jamison & Day*, for defendants in error.

I. By the amendment to the city charter which authorizes the city council to pave the streets of the city of St. Louis with the Nicholson or wooden pavement, there is no authority given the council to pave the markets of the city and charge the same as a tax upon the adjoining owners, or assess the same against their property, as has been attempted in this case. (Rev. Ord. of St. Louis, 1866, p. 136, §§ 1, 2, of an act approved Jan. 16, 1860; an act for the relief of St. Louis, approved May 13, 1861, Rev. Ord. 1866, p. 146, § 15.)

II. The ordinance under which this work is alleged to have been done does not purport to authorize the city engineer to pave that part of Broadway dedicated and used as a market with wooden pavement, and to charge and assess the same as a tax on the property fronting on the market.

III. The city of St. Louis has for many years and at large profit rented the sidewalk and street in front of this property, and the entire block in which it is located, as a market to the hucksters, who occupy the same during the greater part of the day, thus cutting off the occupants of this property from the benefit and free use of the sidewalk and street. And it could not be supposed that it was ever intended by the legislature or the city council that the great expense of keeping this market space should be taxed against the owners of the property fronting on the market.

IV. The city council, by its own act, in dedicating and using that part of Broadway in front of this property as a market, has changed its character from a street to a market, and is estopped from recognizing it as a street, in order to bring it under the taxing clause of this ordinance, while for purposes of occupation and revenue it is regarded as a market.

V. Although, according to the ordinance regulating this market, the entire space between the sidewalks is not rented to the occupants of the market, yet that part of the space which is rented

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lies in front of the property and between it and the middle of the market, which is left open for a carriage-way, and the property is cut off from its free use and enjoyment. And a portion of the sidewalk, which constitutes a part of the market, and is owned, used, and occupied by the city as such, intervenes between this property and the pavement sought to be charged against it; and we think that, by the terms of the ordinance, independent of the power of the city council to impose this burden on the defendants, it should be paid out of the city treasury and borne by the city at large.

HOLMES, Judge, delivered the opinion of the court.

This is a suit by a contractor with the city of St. Louis for the paving of a street, under the city ordinances, upon a certified tax bill in the usual form. The defendants had judgment on demurrer to the answer.

The defense rested on the ground that the city was itself the occupant of a portion of the street fronting the defendants' property as a stand for market-wagons during certain hours of the day, and as a part of the established market-place; and it was contended that, in such case, the cost of paving the street should have been paid by the city auditor out of the appropriations for streets and alleys, under the ordinance regulating the engineer department. (Rev. Ord. 1866, p. 328, § 21.)

We think it is very clear that the defendants have wholly misconceived the intention and effect of the ordinances. This is made apparent by reference to the preceding section (18), which provides that whenever the city is itself "the owner or occupant of property fronting upon the street sought to be so repaved," upon the petition of the owners the mayor may sign such petition on behalf of the city; and then it is further provided (§ 21) that, "whenever the city of St. Louis, as owner or occupant of property," shall be chargeable for such work, the auditor shall pay the same as aforesaid. These provisions can have no application to a case of this kind. The city is not shown to be chargeable as the owner or occupant of any property fronting on the street.



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The ordinance establishing the North Market, it is true, sets apart "all that portion of Broadway" between Morgan and Carr streets, eight feet wide along the curbstone, for stands for farmers' wagons, and subjects it, as "a part of the North Market," to the regulations of the market and to the supervision of the market-master during certain hours of the day; but this does not make the city, in any proper sense, the occupant of property fronting on the street. At most it could only be considered an interference with the ordinary use of the public street. Whether or not such interference would properly come within the power which the city may lawfully exercise over the regulations of streets or markets, or would amount to any unlawful invasion of the rights of the defendants to the use of the street in common with the public generally, or what remedy, if any, they would have in such case, we need not inquire on this record. It is enough for all the purposes of this demurrer that the facts specially pleaded in the answer constituted no valid defense to the action, and the demurrer should have been sustained.

The judgment will be reversed and the cause remanded. The other judges concur.

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THE MOUND CITY MUTUAL FIRE AND MARINE INSURANCE COMPANY, Respondent, v. PETER CURRAN, Appellant.

1. *Fire Insurance Policy—Variation, effect of.*—The charter of a mutual fire insurance company contained a provision that "if property insured by said company shall be alienated by sale or otherwise, the policy issued thereon shall be void, and shall be surrendered to said company to be canceled." Property so insured was sold, and the holder of the policy agreed with the secretary of the company that said policy should be so altered as to cover other property of the assured differently situated; and this agreement was indorsed on the policy and signed by the secretary. *It seems* that such provision avoided the policy utterly, not only as to the property originally insured, but as to that so agreed to be substituted in its place.
2. *Fire Insurance Policy—Premium Note, consideration of—Power of Insured to recover loss upon Policy.*—Such a policy is utterly void independently of this provision, for neither the insured nor the alienee of the insured could have recovered a loss upon it. After the alienation the consideration of the note would fail, and the note itself would become void also.

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3. *Fire Insurance — Written Application — Authority of Secretary alone to make Contract of Insurance.*— Where the charter and by-laws of an insurance company provided that policies should be issued only upon a written application, making representation of all material circumstances affecting the risk, and should be signed by the president and secretary, such indorsement of the secretary was void. He had no authority to make a policy or contract of insurance otherwise than in the manner prescribed in the charter and by-laws. Even though the president had signed the original policy, and the same instrument was again issued by the secretary as a blank newly filled up, upon verbal application, this would have been equally without authority and a fraud upon the company.

*Appeal from St. Louis Circuit Court.*

Plaintiff's charter contained the following provisions :

"Sec. 9. That in all cases where real or personal property insured by said company shall become alienated by sale, or change in partnership or ownership, or otherwise, the policies issued thereon shall be void, and shall be surrendered to said company to be canceled; and said company shall not be liable for any loss or damage which may happen to any property after such alienation as aforesaid, unless the policies issued thereon shall have been duly assigned or confirmed, by consent of the directors, to the actual owner thereof, previous to such loss or damage; and no policy issued by said company shall be deemed to have been duly assigned or confirmed, unless the consent of the directors to such assignment or confirmation is certified on such policy by the secretary of said company.

"Sec. 16. When any house or building shall be alienated by sale or otherwise, the policy thereon shall be void, and be surrendered to the directors of said company to be canceled; and upon such surrender the assured shall be entitled to receive his, her, or their deposit note, upon the payment of his, her, or their proportion of all losses and expenses that have occurred prior to such surrender: *Provided*, however, that the grantee or alienee having the policy assigned to him may have the same ratified and confirmed to him, her, or them, for his, her, or their proper use and benefit, upon application to the directors, and with their consent.

"Sec. 12. If any member, his heirs, executors, administrators, or assigns, shall neglect or refuse the payment of any assessment

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duly ordered by the directors of said company for the term of thirty days after the same shall have become payable, agreeable to public notice given as aforesaid, the party so in default shall be excluded and debarred, shall lose all benefits and advantage of his, her, or their insurance or insurances, respectively, for and during the term of such default or non-payment, and notwithstanding shall be liable and obliged to pay all assessments that shall be made during the continuance of his, her, or their policies of insurance, and the directors may sue and recover the whole amount of his, her, or their deposit note or notes, with cost of suit.

"Sec. 14. Said company may make insurance for any term not less than one month nor more than ten years; and for the convenience of shippers may issue open policies, as is usual in other insurance companies; and any policy of insurance issued by said company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on said company."

Appellant, on the 5th day of March, 1860, insured certain property with the respondent, for the term of six years, and gave his premium note, in the sum of \$180, for the payment of the assessments thereon. On the 12th day of February, 1862, appellant sold the said property, and the alienee declined to accept an assignment of the policy. On the 14th of February, 1862, appellant, to avoid the expense of a new policy, made a verbal application to the respondent's secretary to have the said policy so changed as to cover other property in another part of the city belonging to appellant. In compliance with this application the secretary agreed to so alter the policy, which agreement was evidenced by the following indorsement on the policy:

"St. Louis, February 14, 1862.

"It is agreed that from and after this date this policy cover the — story brick building erected by the assured on the southwest corner of Eleventh street and Cass avenue, block numbered 588, in the sum of two thousand dollars, the property mentioned in the policy having been sold. It is also agreed that as the building now covered by this policy is to be fitted up as a distillery, when so fitted up it shall be surveyed, and the rate then agreed on shall be paid. Payment of cash assessment to be paid to make this policy valid.

"DAVID H. BISHOP, *Secretary.*"

Appellant, in consideration of this agreement, permitted the premium note to remain in the hands of the company as premium

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for this insurance; and afterward, in consideration of additional risk and increased rate of insurance, gave another premium note for \$435.

Appellant paid all assessments on both notes from the time they were given until the last one, ordered shortly before his policy by its terms expired. This he refused to pay, and respondent brought suit under the twelfth section of the charter above quoted.

*John W. Moore*, for appellant.

I. At the instant of the sale this policy was absolutely voided by the terms of respondent's charter. The assignment of the policy to Curran's grantee was the only way in which the policy so voided could be continued as a valid and binding policy of insurance. (Sess. Acts 1855, p. 96, § 9.)

II. The note of \$180 ceased to be a legal demand in the hands of the company, because no longer subject to assessments. (8 Blackf., Ind., 50, 150.) While it may be that under ordinary circumstances a party to a contract cannot avoid it by his own act, yet when forfeiture is, by the contract, the expressly declared incident of any violation of its terms, then this is the law of the contract, and by it the parties must be governed. (Keenan v. Mo. St. Ins. Co., and Ryder v. Mo. St. Ins. Co., 12 Iowa, 126; McCullough v. Ind. Mut. Ins. Co., 8 Blackf., Ind., 50, 150; 3 Hill, 508; Frost v. Saratoga Mut. Ins. Co., 5 Den. 156-7; 1 Phil. on Ins. § 87, and cases cited in notes.)

III. The writing of Feb. 14, 1862, not having the formalities of an original instrument, nor being executed in the mode prescribed in section 14 of respondent's charter, was not a valid, binding policy of insurance upon the property on Eleventh street and Cass avenue. It is evidently nothing more than a declaration of the terms upon which the company was willing to insure. (Plahto v. M. & M. Ins. Co., 38 Mo. 248; Ang. & Ames on Corp., cases cited, ed. 1858, p. 291-2; 6 Exch. 137; 11 C. B. 928; 16 Q. B. 290; 9 Exch. 457.) The Plahto case settles a part of this fallacy, and affirms the well-settled rule of law that the charter is an enabling act giving the company all the powers it possesses; and that when there is a particular mode expressed

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for contracting, that mode must be strictly followed, or it is no more a contract than if the company had no existence. (Ang. & Ames on Corp. 291; 11 C. B. 926-7.) When the directors of a company do acts in violation of their deed, in a matter in which they have no authority, such acts are altogether void. (31 Eng. L. & Eq. 57.)

IV. The payment of assessments by appellant after the alienation does not estop appellant from denying the validity of the charter and the consideration for the premium notes. (35 N. H. 328; 9 Cush. 140; 7 Hill, 49; 16 Barb. 254.)

V. No power is vested in the secretary by the policy or charter, or proven as custom or an irregularity adopted by the company, to substitute one risk for another, even when the policy is in force, much less by such an indorsement when the policy was null and void at the time of such attempted substitution. The subject matter of the risk is of more importance than the "moral hazard," and no change can be made save by an instrument in form, usual mode, etc.

*T. A. & H. M. Post*, for respondent.

I. The alienation of property originally insured did not, *ipso facto*, release defendant from his subsequent obligation on the premium note or the assessments based upon it.

The principal end aimed at by sections 9 and 16 of plaintiff's charter, providing that policies of insurance should not be alienated without the consent of the insurers and certain prescribed formalities, was to establish a safeguard against the practices of unknown and unprincipled men. The contract is one of personal indemnity, and is founded mainly in a reliance upon the character of the insured. (Ang. on Ins. §§ 1, 194, 200; Tillon v. Kingston Ins. Co., 7 Barb. 574.) This end was accomplished by the original contract of insurance. The party insured continued the same.

II. Sections 9 and 16, in case of alienation, make the forfeiture, if the insurers so elect, conditional upon surrender of the policy for cancellation by the insured.

III. Even assuming that such alienation avoided the policy,



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defendant continued liable upon his deposit note until the surrender thereof. The policy and premium note are independent contracts. The former is not the consideration of the latter. Mutual insurance companies are *quasi* partnerships. The premium notes are their capital. The standing and credit of these companies and their capacity to meet losses depend upon their power to collect assessments upon them. Hence, a definite and sharply-defined rule by which to determine who are liable, and to what extent, upon their notes, lies at the foundation of their existence. They have fixed upon such a rule, viz., the surrender of the policy. And this is a special covenant in the articles of agreement between the partners. The insured continues a member of the company and bound by his agreement for the period for which he was originally insured, except in case of such surrender. (*Hyatt v. Waite*, 37 Barb. 39, 421; *Ind. Mut. Ins. Co. v. Coquilard*, 2 Cart., Ind., 646; *Hunting v. Beecher*, 30 Barb. 580; *New Eng. Mut. Ins. Co. v. Belknap*, 9 Cush. 140; *New Eng. Mut. Ins. Co. v. Butler*, 34 Me. 454; *Neely v. On. Mut. Ins. Co.*, 7 Hill, 51; *McCullough v. Ind. Mut. Fire Ins. Co.*, 8 Blackf. 54.)

IV. The indorsement on the policy, signed by the secretary, made it a good and valid policy as to the new property. It was, therefore, a good continuing consideration for the first note. There is no provision in the charter or by-laws requiring the signature of both president and secretary to such indorsement. Section 14 refers to the original policy, which was thus signed. Alterations inserted in a policy by the underwriters, without any new signature, will be valid if assented to by the insured. (*Trustees First Bapt. Ch. v. Brooklyn Fire Ins. Co.*, 19 N. Y. 310; 1 Phil. on Ins. § 110; *Safford v. Wycoff*, 4 Hill, 457; *Warren v. Ocean Ins. Co.*, 16 Me. 439.) The acceptance of the person of the assured had been accomplished by the signatures of these officers to the original policy, and the assent of the company was to be presumed from the signature of the secretary to the indorsement. (*New Eng. Ins. Co. v. DeWolf*, 8 Pick. 62-3; *Bank U. S. v. Dandridge*, 12 Wheat. 81, 88; *Ang. & Ames on Corp.* 328.)

V. The action of plaintiff, in levying and collecting assessments

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on said notes after the indorsement on the policy, cured all irregularities, if any existed, in the alteration of the policy, and rendered it a valid contract and a good consideration for the notes by establishing consent and mutuality of consideration. (*Keenan v. Mo. St. Mut. Ins. Co.*, 12 Iowa, 134; *Frost v. Saratoga Ins. Co.*, 5 Denio, 156-7.)

VI. Defendant, by his action in giving a new note and paying assessments on both notes after the alteration of the policy, estopped himself from denying the validity of the consideration for the notes. Such acts were admissions of his own liability, and were promises of payment; and every payment made was an admission on his part of the validity of the consideration for the notes. These admissions induced the plaintiff to continue the policy in force, and to grant new insurance, for which they would unquestionably have been liable. (1 Phil. on Ev. 453; *Greenl. on Ev.* p. 272, § 207; *Bargate v. Shortridge*, Eng. L. & Eq. R. 57, 258; *Frost v. Saratoga Ins. Co.*, 5 Denio, 156-7.)

The case of *Plahto v. The Merchants' and Manufacturers' Ins. Co.*, 38 Mo. 248, turns upon a different question. In that case the policy was an open one, and the goods insured were not indorsed upon or written in it at all. It was strictly a parol, a mere verbal contract, and was so regarded by the court. The court held that a contract of insurance must be in writing, and that an omission to make it in writing was fatal. The effect of the signature of the secretary alone does not come in question.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff brings this action upon certain premium notes. The property insured in the policy had been alienated without an assignment of the policy. The defendant desiring to be insured on other property situated in another part of the city, the secretary of the company made an indorsement on this policy to the effect that it should cover that property in the sum of two thousand dollars, and that when the building should be fitted up for the purposes of a distillery an increased rate of premium should then be agreed upon and paid. It was signed by the secretary only. An additional note was afterward given for the increased rate

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of premium. The defendant continued to pay assessments upon these notes up to the last one due before the time expired, and then refused to pay any more; and for this the plaintiff sues.

There was an express provision in the charter and policy that it should be void if the property should be alienated without an assignment of the policy with it, by consent of the directors, certified by the secretary. This policy was utterly void independently of this provision, for neither the assured nor the alienee of the property insured could have recovered a loss upon it. The premium note might be valid until all assessments had been paid, up to the time of the alienation; but after that the consideration would fail, and it would become void also. (*Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 126; 7 Hill, 49; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.)

There was no new policy at all. Whether considered as a new policy or as an agreement for a policy, the indorsement was absolutely void. It appears that both the secretary and the defendant understood and intended it for a new policy, or rather supposed it would be a valid insurance and avoid the expense of a new policy and a stamp. The charter and by-laws provided that policies should be issued only upon a written application, making representation of all material circumstances affecting the risk, and should be signed by the president and secretary. The secretary had no authority to make a policy or contract of insurance otherwise than in the manner prescribed in the charter and by-laws. (*Plahto v. Merchants' and Manufacturers' Ins. Co.*, 38 Mo. 255.) It might be urged that the president had signed the original policy, and that the same instrument was again issued by the secretary, as a blank newly filled up, upon the new verbal application. This would have been equally without authority, and a fraud upon the company. It was intentionally issued without a stamp, and this was a fraud upon the revenue. The premium note given upon such a transaction must be deemed to have been wholly without any valuable consideration, and void also. The company has received assessments upon these notes, both destitute of any valuable consideration, during nearly the whole period of the supposed insurance, upon a policy on which the defendant

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could never have recovered a loss against them, and they now seek to enforce this demand against him. Neither law nor justice can uphold it.

We are of the opinion that the instructions given for the plaintiff were both erroneous.

Judgment reversed and the cause remanded. The other judges concur.

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IN THE MATTER OF WILLIAM K. SPEED AND WIFE, Appellants,  
v. ST. LOUIS COUNTY COURT, Respondent.

1. *Revenue — Taxation — Property occupied by the National Government, when exempt.*—Property occupied by the national government will not be exempt from State taxation unless the title and ownership thereof be vested in the United States. Taxes are assessed against the real owner without any regard to temporary occupancy, and the obligation of payment follows the assessment.

*Appeal from St. Louis Circuit Court.*

This was an application to the County Court to correct an assessment of property alleged to be erroneously and improperly assessed. The property is historically known as the Gratiot-street Prison. Government seized it—used it first for prison, subsequently for hospital purposes. It was regularly assessed for taxes, under the authority of the State, during the years in which it was so held by government.

*J. C. Moody*, for appellants.

I. The record in this case shows that the property assessed with the taxes in question was used and occupied, all the time for which the taxes were assessed, by the government of the United States, to the exclusion of the plaintiffs, and for governmental purposes. It was, therefore, not taxable by State, county, or municipal authority. Even if the United States government should at some future day pay plaintiffs for the use of their property, of course it would refund them this tax if they are compelled to pay it. It

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is, therefore, in every point of view, an attempt to tax the general government and obstruct the exercise of its lawful powers. (Dobbins v. Commissioners of Erie, 16 Pet. 435; McCullough v. Maryland, 4 Wheat. 316; Woston v. Charleston, 2 Pet. 449; Bank of Com. v. Commissioners of New York, 2 Black, 620; Bank Tax cases, 2 Wall. 200.)

*H. A. Clover*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The appellants were seized and possessed of certain real estate in the city of St. Louis which the United States government took possession of in 1861 and continued to hold and occupy till 1865, when it was voluntarily relinquished and returned to its owners, the appellants. It is now claimed that it was illegal to levy and assess a tax on the property for the time the national government so held and occupied it. The law exempts from taxation all lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States.

But we cannot see upon what principle this exemption clause can have any application to the appellants' property, nor has any reason been suggested for giving it such force and direction. The property, to be exempt from taxation, must belong to the national government—the title and ownership must be vested in it.

If the government, in the execution of its powers or to carry out its functions, finds it necessary and convenient to rent property, it cannot be held that the landlord, during the time the property is so occupied, can be exempted from paying taxes. So, if the government or a private individual with a strong hand forcibly intrudes into and seizes the possession of property, it will make no difference with reference to the taxing power. Taxes are assessed against the real owner without regard to temporary occupancy, and the obligation of payment follows the assessment. There is no evidence to show that the government ever asserted any claim or title whatever to the property. It was used as the exigencies of the times demanded, and then abandoned to the lawful owner.



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If the appellants are entitled to any relief, they must appeal to the justice and generosity of the general government. We are wholly inadequate to furnish it here. Judgment affirmed.

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GEORGE SANDFORD AND MATTHEW B. CURTIS, Appellants, v.  
JOHN TREMLETT, J. T. SPENCER, AND JOSEPH W. SIMMONS,  
Respondents.

1. *Corporations — Seal — Evidence.*—The common-law doctrine that corporations can do no act except by writing, duly attested by the corporate seal, appears to be greatly relaxed in England by the recent decisions, and in this country to be almost if not entirely repudiated. But the law still seems to be well settled that the common seal of a corporation is to be taken as the only proper evidence of its act in all cases where a seal would be required if the instrument is to be executed by an individual.
2. *Lease — Assignment — Formalities required.*—It is not requisite that the assignment of a lease made by a corporation should possess the characteristics of a deed. Being a note in writing, signed by the agent of the corporation, authorized in the manner required by law, it is clearly within the terms of the act concerning frauds and perjuries, and must be considered competent evidence to show a transfer of the leasehold.
3. *Lease — Transfer — Individual — Corporation.*—An individual holding such a lease could transfer it without the formalities of a deed, and nothing more ought to be required of a corporation.

*Appeal from St. Louis Circuit Court.*

The testimony of a witness for the appellants showed that during the year 1864 he was recording secretary of the Western Seamen's Friend Society; that the affairs of the society were conducted by an executive board, consisting of the president, vice-president, secretaries, treasurer, auditor, and directors; that on September 20, 1864, the following resolution was adopted by the executive board: "*Resolved*, that the corresponding secretary of the Western Seamen's Friend Society be and is hereby authorized and empowered, in the name and in behalf of said society, to assign and transfer to ——— a certain lease made to said society by Peter Lindell, of St. Louis, dated June 1, 1853, and for property in said St. Louis;" that this resolution was recorded in the proceedings of the board; that R. H. Leonard was the cor-

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responding secretary of the society; that the name of the party to whom the assignment was to be made was omitted from the resolution because Leonard had not determined definitely upon the assignee; that the assignment was subsequently made and executed by the Western Seamen's Friend Society, by R. H. Leonard, its corresponding secretary.

The appellants put in evidence also the lease from Lindell to the society. They then offered in evidence the following assignment of the lease:

"Know all men by these presents: That in consideration of the sum of thirteen hundred dollars paid by Sandford & Curtis, the Western Seamen's Friend Society does hereby assign, transfer, and set over unto the said Sandford & Curtis, a certain lease made by Peter Lindell to said society, which lease is dated June 1, 1853, and which said lease is hereto annexed. And for the consideration aforesaid, the said Western Seamen's Friend Society does hereby assign, transfer, and set over all and each of the covenants in said lease contained, together with all the rights and privileges granted in the said lease, unto the said Sandford & Curtis, to have and to hold the said lease, said covenants, and said rights and privileges, unto the said Sandford & Curtis, and to their heirs and assigns forever.

"In witness whereof, the said Western Seamen's Friend Society doth hereto set its seal, and subscribe its name hereto, by its agent duly authorized. WESTERN SEAMEN'S FRIEND SOCIETY,

"[L. s.]

By R. H. LEONARD, Cor. Sec'y."

The defendants objected to the introduction in evidence of this assignment, on the ground that it was not made by the said Western Seamen's Friend Society or by any one duly authorized to make the same; and further, that said writing was not competent evidence in the cause. The court sustained the objection and excluded the assignment.

The remaining facts pertinent to this case appear in the opinion of the court.

*Glover & Shepley, and Krum, Decker & Krum, for appellants.*

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I. The last clause of the constitution of the Western Seamen's Friend Society, authorizing its executive board "to do such other business as the interests of the society may require," included the power to dispose of real estate.

II. The executive board appointed the recording secretary as their agent to represent the society, and for it to transfer the lease; and in the absence of positive prohibition in the constitution, the board had full power to so appoint one of their own number. (*Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; *Hickur v. U. S. Bank*, 8 Wheat. 355; *Merrick v. Trustees, etc.*, 8 Gill., Md., 59.) Nothing beyond the fact of his having been named and appointed by a resolution of the board was needed to give the agent complete authority. (*Randall v. Van Vechten*, 19 Johns. 65; *Bank of Columbia v. Patterson*, 7 Cr. 299; *Lathrop v. Bank of Scioto*, 8 Dana, 115; *Wright v. Lankton*, 19 Pick. 290; *Banks and Dauphin Co. v. Meyers*, 6 Serg. & R. 16.) And having been duly appointed, the agent acted within the scope of his authority, and executed a transfer of the lease which fully conveyed the society's interest. (*Bank of Columbia v. Patterson*, 7 Cr. 299; *Sheutze et al. v. Bailey et al.* 40 Mo. 69.)

III. The assignment was legally executed in the name of the society by its duly authorized agent. The absence of a corporate seal, other than a mere scroll, does not invalidate the instrument. (*Bank of Columbia v. Patterson*, 7 Cr. 299; *Buckley v. Briggs*, 30 Mo. 452; *Ang. & Ames on Corp.*, 8th ed., § 237, *a*, cases cited.) Even if the seal of the corporation, other than a scroll, is deemed essential, the scroll affixed by the agent must be presumed to be the seal of the corporation until the contrary has been shown. (*Phillips v. Coffee*, 17 Ill. 154; *Mill Dam Foundry v. Hovey*, 21 Pick. 417.)

*Knox & Smith*, for respondents.

I. There is no evidence of a legal transfer or assignment of the lease to plaintiffs. (*Ang. & Ames on Corp.* §§ 219, 223, 225, 236, 238, 295.)

II. R. H. Leonard had no legal authority to execute the paper offered in evidence.

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III. Said alleged assignment is not the act and deed of the lessee in the original lease.

FAGG, Judge, delivered the opinion of the court.

We are limited by the record in this case to the consideration of only one question. The Western Seamen's Friend Society, claiming a leasehold estate in certain property situate in the city of St. Louis, made an assignment, in writing, of the lease to the appellants, through an agent appointed by an executive board. Suit was thereupon instituted against the respondents, who were in possession of the property, by an action of ejectment.

The proof shows that this society was incorporated by an act of the Legislature of the State of Ohio. Its general objects and purposes, as stated in the charter, were for "disseminating moral and religious instruction and other charities among sailors and boatmen doing business on our Western waters," with full power and authority "to acquire, possess and enjoy, sell, convey and dispose of, property—real, personal, or mixed." The lease was for a term of twenty-six years and nine months, commencing from the first day of June, 1853. The assignment bears date September 20, 1864.

It was shown that all the business of the society was transacted through the intervention of an executive board, chosen in the manner provided for by the constitution. The board, by resolution duly entered of record, authorized the transfer of the lease in question, and designated the corresponding secretary of the society as its agent for that purpose. The assignment is made in writing by the person appointed for the purpose, and the word "seal," with a scrawl around it, is attached to the signature. It purports on its face to be subscribed by the society, with its seal attached, although actually signed in the manner before stated. The introduction of this paper being objected to at the trial as incompetent, it was excluded by the court, and the plaintiff submitted to a non-suit.

It is not necessary to discuss the question of the power of this corporation to acquire and hold such real estate as might be necessary to its efficiency in carrying out the objects of its creation.

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Such a power seems to have been intended by the terms of the charter. The power also to transact its business through the general agency of an executive board cannot be questioned.

The prescribed duties and functions of this board, if consistent with the terms of the charter and not in conflict with the laws of the land, are to be taken, when properly performed, as the acts of the society itself.

The authority of the corresponding secretary being sufficiently shown by an attested copy of the proceedings of the board, it remains only to be seen whether the paper which he executed is to be taken as competent evidence of the transfer of the society's interest in this property. The common-law doctrine that corporations can do no act except by writing, duly attested by the corporate seal, is said to be greatly relaxed in England by the recent decisions, and in this country almost if not entirely repudiated. (Taylor's Landlord and Tenant, § 127.) However that may be, we think it has no application in the case at bar. The law still seems to be well settled that the common seal of a corporation is to be taken as the only proper evidence of its act in all cases where a seal would be required if the instrument is to be executed by an individual. Or if it has no common seal, and should adopt one for the time being, that would be sufficient when coupled with proof of that fact as well as the authority of the person acting for the corporation to use it.

But this instrument required no such attestation to establish its validity. It is not requisite that it should possess the characteristics of a deed. Being a note in writing, signed by the agent of the corporation, authorized in the manner required by law, it is clearly within the terms of the second section of the act concerning frauds and perjuries, and must be considered competent evidence for the purpose for which it was introduced. An individual holding such a lease could transfer it without the formalities of a deed, and nothing more ought to be required of a corporation. (R. C. 1855, pp. 806-7.)

The judgment of the Circuit Court must be reversed and the cause remanded. The other judges concur.



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Lake, Adm'r of Tyler, v. Meier, Adm'r of Von Dembusch.

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JAMES R. LAKE, Administrator of JARED D. TYLER, Respondent,  
v. ADOLPHUS MEIER, Administrator of EDWARD VON DEM-  
BUSCH, Appellant.

1. *Administration—Statute, construction of.*—Section 2, chap. 122, Gen. Stat. 1865, contemplates something more than the mere allowance against the estate of the deceased of an account for the purchase money of the real estate therein mentioned, to pass the title and complete the contract. The executor or administrator can use the assets to complete the payment by order of the court; but before the court can make the order it must examine into the affairs and condition of the estate, and determine whether it will be beneficial to the estate or injurious to creditors. A judicial determination of the facts is necessary before the order can be made or the subject passed upon.

*Appeal from St. Louis Circuit Court.*

*A. M. Gardner*, for appellant.

The plaintiff in this action, by attempting to have his alleged claims allowed in the Probate Court, seeks to force the administrator to complete a purchase of real estate charged to have been made by Von Dembusch in his lifetime.

I. This is an illegal attempt on the part of respondent to obtain by a proceeding at law what could only be obtained, if at all, by proceedings in equity, or by a special order, in the form of a decree, for a specific performance of the alleged contract, with notice to all the parties in interest. (Gen. Stat. 1865, chap. 122, p. 496, § 2.) It certainly cannot be pretended that the allowance of a claim in the form of an account in the usual way is such an order as is required or was intended by the provisions of that statute.

II. If a person dies possessed of a contract for the purchase of lands before a title is made to him, his interest under such contract descends to his heirs, and does not rest in his executor or administrator. The heirs alone can complete the purchase, although at common law they might compel the administrator to pay for the same out of the personal estate. (Willard on Exec. 330, etc.; *Champion v. Brown*, 6 Johns. Ch. R. 398; *Griffith v. Beecher*, 10 Barb. 432; *Aubuchon v. Levy*, 29 Mo. 99; *Logan v. Caldwell*, 29 Mo. 373; *Lane v. Thomson*, 43 N. H. 320; *Gladson v. Whitney*, 9 Iowa, 267; *Smith v. McConnell*, 17 Ill. 135.)

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*Cline, Jamison & Day*, for respondent.

I. The Probate Court had jurisdiction, and it was its duty to allow plaintiff's claim for the purchase money. (Gen. Stat. 1865, p. 502, § 9; *Jewett v. Weaver's Adm'r*, 10 Mo. 234; *State to use of Smith v. Paul's Ex'r*, 21 Mo. 51.)

II. Even if the deed should be defective, the court below properly allowed the claim for the purchase money; and upon the payment of the same, the legal representatives could compel the legal title to be vested in them.

WAGNER, Judge, delivered the opinion of the court.

The proceeding in this case was originally instituted in the Probate Court. It seems that in 1856 Jared D. Tyler died, and Lake, the respondent, was duly appointed his administrator; that the Probate Court made an order to sell certain real estate belonging to the estate of Tyler, and that at the sale one Edward Von Dembusch became the purchaser, and in his lifetime paid thirty dollars of the purchase money. Lake made a report of his proceedings at the next term of the court after the said sale, which report was approved and the sale confirmed. Before the deed was made out and executed and the terms of the sale complied with, and prior to the time of the approval and confirmation by the court, Dembusch, the vendee, died, and Meier, the appellant, was duly appointed his administrator. Lake executed a deed, with Dembusch or his legal representatives as grantees, and tendered the same to Meier, and then presented his account for allowance to the Probate Court, against the estate of Dembusch, for the purchase money of the land. The court allowed and classified the demand, and Meier appealed to the Circuit Court, where the judgment was affirmed, and the cause is now brought here for revision.

If any relief or specific performance had been demanded, according to equitable rules it is obvious the proceeding would have been bad, as the matter concerned the realty, and the heirs would have been necessary parties. But the respondent bases his claim on statutory provisions, and it is very clear that the statute will not warrant or support the judgment.

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By Gen. Stat. chap. 122, p. 496, § 2, it is declared "that if any person die, having purchased real estate, and shall not have completed the payment, nor devised such estate, nor provided for payment by will, and the completion of such payment would be beneficial to the estate and not injurious to creditors, the executor or administrator, by order of the court, may complete such payment out of the assets in his hands, and such estate shall be disposed of as other real estate."

This section contemplates something more than the mere allowance of an account to pass the title and complete the contract. The executor or administrator can use the assets to complete the payment by order of the court; but before the court can make the order it must examine into the affairs and condition of the estate, and determine whether it will be beneficial to the estate or injurious to creditors. A judicial determination of all the facts is necessary before the order can be made or the subject passed upon. There can be no pretense in the present case that any such examination was made, or that there was any order in compliance with the statute.

The respondent wholly mistook his remedy, and the judgment of the court below was erroneous; it will therefore be reversed and the cause remanded. The other judges concur.

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FREDERICK SCHULENBERG, ADOLPHUS BOECKLER, AND LOUIS C. HIRSCHBERG, Appellants, v. JOHN MAGWIRE, JOHN McNEIL, AND JOHN R. SHEPLEY, Respondents.

1. *Contracts—Assignments—Special and General Covenants—Construction.*—

Where the reason for the deposit of certain notes in the hands of a designated person was specifically stated in a written instrument to be to secure the purchaser of a leasehold against a particular claimant, mentioned by name, the presumption is excluded that they were intended to secure the performance of a general covenant expressed in the instrument, or which the law would imply against the maker. The addition of the words, "or any other claimant," to that of the one specified, does not enlarge the meaning of the instrument so as to make the security given extend to all claims that might be asserted to the property.

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*Appeal from St. Louis Circuit Court.*

The deed of trust first mentioned in the opinion of the court, sale under which was sought to be enjoined by appellants, was given upon the property sold by respondent Magwire. The agreement entered into between Magwire and appellants, and referred to in the opinion of the court, after reciting the sale that had been made to the appellants by Magwire of the mill and machinery and leasehold premises mentioned in the opinion, and stating that Norman Cutter had a claim against the property which he threatened to prosecute, stipulated that four notes of appellants, each for \$2,000, being part of the consideration of said purchase, and which were secured by a deed of trust upon the property, should be placed in the hands of Clark & Miltenberger, or such other person as might be agreed on, "as security until such time as the claim of said Cutter to said ground is fully settled and ascertained to be no longer a valid claim to said block of ground, or until such time as said party of the first part shall place in the hands of said parties of the second part, or in the hands of some person they may appoint, a deed of trust upon such sufficient real estate, to be situate in the city or county of St. Louis, as shall be deemed by said parties of the second part, or two disinterested persons mutually chosen, full and satisfactory security, to the amount of eight thousand dollars, and interest thereon from this date, to save, defend, keep harmless, and indemnify the said parties of the second part against the claim of said Cutter or those who claim under him, or any other claimant; and shall also give good and sufficient security, upon real estate, to save harmless and indemnify the said parties of the second part against all damages, costs, rents, and *mesne* profits which may arise or accrue from or by reason thereof. But if the said claim shall be decided in favor of said Cutter to said block No. 602, then the notes shall be delivered up to said parties of the second part; or if they shall have been paid, and such security to indemnify shall have been given, then on the final decision of such claim such eight thousand dollars and interest shall be considered a debt, and payable to the said parties of the second part. And it is the understanding and

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agreement of the parties hereto that said party of the first part shall be at liberty to furnish the security, as hereinbefore stated, at any time he may elect so to do; and whenever such security, amounting to eight thousand dollars and interest, is so furnished, he, the said party of the first part, will be entitled to the possession of all the aforesaid notes, and the same shall be paid as they fall due and become payable; and in case the said notes of two thousand dollars each, amounting to eight thousand dollars, shall be delivered to the party of the first part, then the security against the claim of Cutter or those claiming under him shall be equal to the amount of the notes and interest at the time the notes mature; and such amount taken as the principal and secured as aforesaid shall remain in the hands of the parties, subject to six per cent. interest from the date when delivered, until the claim of Cutter or those claiming under him shall be finally settled and ascertained to be no longer a valid claim against said block No. 602."

*Knox & Smith*, for appellants.

*Glover & Shepley*, for respondents.

FAGG, Judge, delivered the opinion of the court.

This was a proceeding instituted by the appellants in the St. Louis Circuit Court to enjoin the sale of property conveyed in trust to secure the payment of certain promissory notes mentioned in the petition. It is alleged that in consideration of the purchase from John Magwire of certain leasehold property in the city of St. Louis, with all the buildings and machinery located thereon, the appellants did, on the 15th day of November, 1850, pay to said Magwire four thousand dollars in cash, and execute twelve notes payable to his order, amounting in the aggregate to twenty thousand dollars. Four of these notes, each for the sum of two thousand dollars, and the last due and payable four years after date, were secured by the deed of trust mentioned.

In the articles of agreement executed by these parties at the time of the sale, it was stipulated that, whereas one Norman Cutter was then asserting title to a portion of this property, and



had threatened to sue for possession of the same, the four notes above stated were to remain in the hands of Clark & Miltenberger, of St. Louis, or any other person agreed upon, until the validity of this claim should be fully ascertained and settled.

Magwire had his election to take possession of these notes and collect them as they severally became due, upon the condition that real estate, sufficient in value to cover their aggregate amount, with interest, and to protect the appellants against all loss and injury, should be given as security in their stead. The language of the stipulation in reference to the object of the latter security is, "to save, defend, keep harmless, and indemnify the said parties of the second part (meaning appellants) against the claim of said Cutter *or any other claimant.*" The bill avers that the suit threatened by Cutter was instituted and a portion of the real estate recovered; that the property never would have been purchased but for the stipulation mentioned in the agreement in relation to the security against the claim of Cutter; that by reason of that claim it had been unsafe to build upon or improve the property; that one Eugene Miltenberger and others were *bona fide* claimants of the same property, adverse to those under whom Magwire claimed title, and that suit had been instituted by Miltenberger for a portion thereof; that the security stipulated for had never been given or tendered; that by reason of the recovery had upon Cutter's claim the complainants were entitled to the possession of the notes, and that payment of the same ought not to be enforced against them; that possession of the notes had never been delivered to Magwire, but were deposited with Clark & Miltenberger as an escrow for the purposes stated; that the notes were then in possession of and under the control of John R. Shepley; and that McNeil, another of the respondents, had been appointed to execute the trust, and had advertised and was about to sell their property; also, that Magwire was insolvent.

The prayer of the bill is that the sale be perpetually enjoined and the notes surrendered and delivered up to the complainants. The answer specifically denies all the allegations of the bill tending to show any equitable ground for relief, and sets up a release executed by one Barlow, who had purchased the interest of Cutter,

relieving the complainants from the payment of any rent as to the portion claimed by him, and ratifying the lease under which they held the property, until the expiration of the term.

It is clear that the whole case turns upon the construction of the written agreement as set out in the petition of the appellants. Its meaning is not to be gathered from any isolated expression, but depends upon a fair interpretation of the instrument taken as a whole. The very first sentence in the stipulation, providing for the deposit of the four notes with Clark & Miltenberger, furnishes the key which unlocks any mystery that may be attached to the transaction. Magwire sold only a leasehold interest, to expire on the 1st of July, 1868. The special ground stated for the deposit of the security, in the language of the agreement, is "whereas, one Norman Cutter asserts a title to a part of the ground within the said block No. 602, herein agreed to be conveyed, and that he intends to bring a suit to recover the possession thereof." Besides this there is no special covenant stated in the article, and nothing from which an inference could be drawn that there was at the time in the minds of the parties any other claim against which these notes were to operate as a security. The reason for their being deposited having thus been specifically stated, excludes the presumption that they were intended to secure the performance of any general covenant expressed in the assignment of the lease, or any that the law would imply against the assignor. The condition upon which they were to remain in the hands of the person designated is stated to be "as security until such time as the claim of said Cutter to said ground is fully settled and ascertained to be no longer a valid claim to said block of ground." It will not be pretended that if Cutter himself had, for a valuable consideration, ratified the lease under which the property was held, and released these complainants from the payment of any rent, the condition would not have been fully complied with, and Magwire entitled to the possession of the notes. Barlow having acquired all the interest claimed by Cutter, executed just such a release, and the purposes of the security were thereby fully accomplished. The fact stated in the bill, that the claim asserted by Cutter had been established by suit, is the very reason why

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the release executed by the purchaser of that interest was effectual to protect these complainants in the undisturbed possession of the property. Instead of operating to relieve them from the payment of the notes in question, it seems to be the very strongest reason why they should be compelled to pay them. It appears, however, that in stipulating for the other kind of security which was to be given in the event that the possession of the notes should be delivered to Magwire, the words "or any other claimant" were added to the condition. It is insisted that the use of these words enlarged the meaning of the instrument so as to make the security given in either case extend to all claims that might be asserted to the property. This cannot be true. The whole tenor of the instrument shows that the purchasers were only seeking this special protection against the claim of Cutter. No apprehension seems to have been felt about any other claims, and no guard provided against such.

Magwire, as it appears, has never sought to avail himself of the election given him by the agreement. No effort was made to collect the notes until these parties were fully protected against the claim for which they were intended to be held simply as security. They constitute a part of the consideration for the purchase of the property; and having subserved the purposes for which they were deposited, there can be no reason why they should not be paid in full. They stand precisely as if they had been given to Magwire at the time of their execution, and afterward deposited by him as security against Cutter's claim. There was no proof at the trial of the insolvency of Magwire, and nothing to show that these complainants are not fully protected as to any general covenants for the quiet enjoyment of the premises. The Circuit Court committed no error in excluding the testimony offered by the appellants to show that they were prevented from making improvements on the property by reason of the suit instituted by Cutter. The temporary injunction granted at the commencement of this suit was dissolved by the Circuit Court, and a decree rendered dismissing the bill. This decree was affirmed by the court in general term, and an appeal taken to this court.

The other judges concurring, the decree will be affirmed.

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O'Shea, Adm'r of Sullivan, v. Collier White Lead & Oil Co. et al.

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JOSEPH M. O'SHEA, Administrator of JOHN D. SULLIVAN, Appellant, v. THE COLLIER WHITE LEAD AND OIL COMPANY, and EDWARD BREDELL, Respondents.

1. *Fraudulent Conveyances — Assignments — Secret Preferences.*—In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it forms part of the original transaction and be communicated to the other creditors and they do not object.
2. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*—Such an agreement is against public policy—such an one as the law deems constructively fraudulent—and must therefore be held incapable of enforcement.

*Appeal from St. Louis Circuit Court.*

John D. Sullivan, plaintiff's intestate, was indorser for Cornelius D. Sullivan upon two promissory notes, amounting to about ten thousand dollars, on which judgment was obtained against both parties, and certain real estate of C. D. Sullivan was sold to satisfy it. John M. Krum was the purchaser, and afterward, on May 9, 1862, conveyed the land to John D. Sullivan, who paid the debt. Previous to the sale of this land Joseph L. Papin and Ben. F. C. Champion, trading under the name of Champion & Co., had become embarrassed in business, and made proposals to their creditors asking for terms of extension and composition. The Collier White Lead and Oil Company were large creditors, and, together with other parties, had instituted several attachment suits to secure their claims. After some negotiation a deed of composition was entered into between Champion & Co. and the creditors at large, by the terms of which a lot of land and certain assets of the company were transferred to trustees for the benefit of the creditors, an extension was granted, and

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the attachment suits were dismissed. But in consideration of their relinquishing their attachment, Champion & Co. procured from C. D. Sullivan certain notes secured by a deed of trust, dated January 23, 1858, and recorded February 10, 1858, upon the property afterward sold under execution to Krum, which notes were given to the Collier White Lead and Oil Company as collateral security for the payment of the debt of Champion & Co. The trustees of the Collier White Lead and Oil Company were proceeding to sell this land for the satisfaction of their debt, when this suit was instituted by John D. Sullivan's administrator to enjoin the proceedings—plaintiff claiming the property by virtue of the purchase from Krum, and contending that the deed of trust to the Collier Company was a secret deed, in fraud of the remaining creditors, and therefore null and void.

*T. T. Gantt*, for appellant.

I. 1. The testimony shows that the arrangement by means of which the Collier White Lead Company received the collateral security from Sullivan was a secret one, of which the creditors generally had no notice or knowledge.

2. If the fact were so, the arrangement was a fraud on the other creditors, and the Collier White Lead and Oil Company cannot enforce the security so taken. It is null and void. (Smith v. Bromley, Douglas, 696, *n.*; Cockshott v. Bennett, 2 T. R. 763; Jackson v. Lomax, 4 *id.* 166; Leicester v. Rose, 4 East. 372; Jackson v. Davison, 4 Barn. & Ald. 695-7; Lewis v. Jones, 4 Barn. & Cres. 511-15; Clark v. Upton, 3 Man. & Ry. 89; Wood v. Roberts, 2 Starkie, 417; Smith v. Cuff, 6 Maule & S. 160; Turner v. Howle, 16 Eng. C. L. R. 418; Case v. Gerrish, 15 Pick. 50; Payne v. Eden, 3 Carnes, 213; Wiggins v. Bush, 12 Johns. 306; Clark v. White, 12 Pet. 178, 199; 2 Spence's Eq. Jur. 358-9; Chitty on Cont. 586, last ed.; Pendlebury v. Walker, 4 Young & Col. 440; Knight v. Hunt, 5 Bing. 432; Notes to Chitty on Bills, 96; Jackson v. Mitchell, 13 Ves. 586; 1 Story's Eq. §§ 378-9; Willard's Eq. Jur. 209-10.)

3. It makes no difference that the property or thing thus received by way of giving one creditor the preference over the



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rest was the property of the bankrupt or the note of some friend of the bankrupt or insolvent. (Knight v. Hunt, 5 Bing. 432; Pendlebury v. Walker, 4 Young & Col. 440; 1 Story's Eq. § 379, and cases there cited.)

4. It is incontestable that all the creditors did not have notice or intimation of this secret arrangement, and very doubtful whether any one else had, unless possibly such as had constructive notice, which is not the sort of notice contemplated by the law. If any one creditor be misled or defrauded, it is enough. (Jackman v. Mitchell, 13 Ves. 586; Pendlebury v. Walker, 4 Young & Col. 440, and cases *supra*.)

The rule laid down on the subject of creditors making underhand and secret arrangements with an insolvent, by which, though appearing to stand on the same footing of equality with other creditors, or at least to stand on the terms of the deed of composition, one of them obtains an additional sum of money or security for money from the insolvent or any friend of the insolvent, is very well ascertained, and is laid down without qualification both in England and America. The rule is thus laid down by Willard in his Equity Jurisprudence, pp. 209-10: "A bond to one creditor to secure the deficiency of composition, not communicated to the others, is bad." Per Lord Eldon (Jackman v. Mitchell, 13 Ves. 586): "It is admitted at the bar that if the bond was given to secure to one creditor the deficiency of a composition, and was given without communication of that fact to the other creditors, it is bad in equity, and certainly it is now well understood that it is bad at law also." In Pendlebury v. Walker, 4 Young & Col. 440, it is declared that any one of the creditors to whom such a fact is not communicated can rescind the whole composition; and the correlative of this proposition is that the failure to communicate the giving of this "outside security" to all the creditors makes the security itself void in the hands of whomsoever and against whomsoever. This is the effect assigned to the non-communication of such an advantage by the party obtaining it to all of those who can in any way be influenced by his example, by all the authorities cited under section 2, *supra*.

II. The general proposition that the failure to communicate

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the fact of such "outside security" to any of the creditors vitiates the security obtained of the party to the secret arrangement, would seem not open to contest or question. The court below, however, appears to have ingrafted upon this proposition this qualification, viz: That there must be a *scienter dolus malus* on the part of the preferred creditor in the non-communication to the others of his outside bargain. If he supposed he was merely doing something of special shrewdness, doubtful perhaps in point of honor, but not forbidden by the law, his security is good. But this qualification cannot be supported. The law enjoins upon the creditors of an insolvent, met to consider terms of composition, the observance of the utmost good faith; "*uberrima fides*" is required of them all. In such a case equality is most emphatically equity. Each one is necessarily influenced by the action of the others, and every one who "comes into" the proposed arrangement allures others to follow his example. If any one becomes such a party for reasons not appearing, a plain fraud is committed upon the others, because they are misled by conduct of which the secret differ materially from the ostensible springs. How is the mischievous effect of this conduct altered by the intention which governs the party? It may affect his moral position, but nothing else. There is no warrant anywhere in the authorities for holding *dolus malus* on the part of the preferred creditor to be necessary in order to avoid the security which he takes. The subject is pointedly one of constructive, not actual, fraud. (1 Story's Eq. § 379.) The rule of the various courts that have decided questions arising on this point is, that every creditor is entitled to have communicated to him (not another) the facts by which the conduct which he is called to imitate is influenced; and every one toward whom any concealment or want of communication, or non-communication, is observed or practiced (and the motive of the concealment or non-communication is of no earthly consequence) is injured, defrauded, and deceived, and for this reason the law makes utterly void all payments made on any security for payments to be made to any creditor stipulating for any such unfair advantage and preference. The Massachusetts and New York decisions are very emphatic. They permit money already paid

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under such circumstances to be recovered back. In Massachusetts, at least, this does not result from statutory regulation; and in New York the statute goes really no further than do the Court of King's Bench and the Court of Chancery in England. Lord Eldon, 13 Ves. 586, considered it necessary to decide expressly that bonds "creating an obligation to pay the deficiency of a composition" were not in all cases void, and instanced one case in which such a bond, being made known to the other creditors and assented to by them, was "held to be good." (Pendlebury v. Walker, 4 Young & Col. 440; Cockshott v. Bennett, 2 T. R. 763; 14 East. 372; 4 T. R. 166; Jackson v. Lomax, 4 Barn. & Ald. 695; 2 Starkie, 417; 16 Eng. C. L. R. 418; 6 Maule & S. 160; 3 Carnes' Rep. 213.)

*Cline, Jamison & Day*, for respondents.

I. The deed of composition and agreement signed by the creditors expressly recognized the security of the Collier White Lead Company. By them the creditors were not placed upon an equal footing. They merely extended the time of payment, and classified the payment of the debts out of the property assigned, as follows: 1st. Notes indorsed by Robert Forsyth. 2d. Notes indorsed by C. D. Sullivan and others. 3d. Debts secured by attachment suits not previously secured. 4th. All other debts of the assignors not above provided for. (Lee v. Lockhart, 3 Mylne & Cr. 302.) The deed of trust by C. D. Sullivan to the Collier White Lead and Oil Company was executed and recorded in the recorder's office, February 16, 1858, and the deeds of assignment and composition were executed and recorded February 22, 1858. Thus the Collier Company, an attaching creditor, was previously secured, as mentioned and provided for in the composition deed and agreement of the creditors.

II. The execution of the notes and deed of trust by C. D. Sullivan to the Collier White Lead and Oil Company, for a part of the debt due it by Champion & Co., was not kept secret, nor attempted nor intended so to be kept, from the creditors of Champion & Co. or any of them, as appears from the agreement and the testimony of witnesses. All of the creditors and indorsers

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of the assignors knew that said Collier Company had secured its debt by attachment suits, and knew it would not dismiss them and sign the composition deed unless its debt was secured. All the indorsers and a large number of the creditors knew that said Collier Company were secured by the indorsers prior to the signing or execution of the deed of composition.

III. The Collier Company, by accepting the notes secured by the deed of trust of C. D. Sullivan and other indorsers of Champion & Co., obtained no undue advantage over the other creditors, having by its superior diligence secured the debt by attachment suits. (*Clarke v. White*, 12 Pet. 178-199.) The property attached was ample security.

IV. There was no fraud, constructive or express, in the transaction. The Collier Company, its officers and its agents, in the whole transaction acted in good faith. There was no secrecy or concealment attempted or intended. The indorsers and creditors knew of the arrangement. The Collier Company, having by its activity and diligence secured the debt, finally agreed to substitute the notes of the indorsers of the assignors in lieu of the property attached, as provided for in the composition deed or agreement of the creditors, whereby the other creditors obtained all the benefit of this property attached. The consideration was legal and valid. The Collier Company released its attachment suits, and C. D. Sullivan was released of his indorsements to the amount of \$30,000.

V. The signing of the composition deed by the Collier Company did not induce any of the creditors to sign the same. (*Lewis v. Jones*, 4 Barn. & Cres. 511.)

VI. The Collier Company did not receive or realize anything from the property of the assignors, nor from the property assigned, all of which the other creditors received the benefit of. Thus the Collier Company, by signing the composition deed, benefited the other creditors instead of injuring them, and of course they would have no ground of complaint.

VII. Public policy does not require the court to interfere, as there was no fraud in the transaction and the contract was a legal and valid one.

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WAGNER, Judge, delivered the opinion of the court.

Champion & Co., being in failing circumstances, and in fact insolvent, made a proposal to their creditors for a composition, for the completion of which the consent of all the creditors was necessary. They assigned all their property to certain trustees, who were, as speedily as possible, to turn the property into available assets and pay off the debts and distribute the assets in the manner designated in the deed of assignment. The agreement for the composition was signed with the express understanding and upon the condition that all the creditors should assent thereto. The Collier White Lead and Oil Company and other creditors had previously taken out attachments and levied the same upon the property of Champion & Co. Nothing could be done toward perfecting the arrangements for a composition between the creditors till these attachments were dismissed. Finally the Collier White Lead Company, who had for some time refused, acceded to the agreement and dismissed their attachment, and the other attaching creditors also dismissed theirs, and the whole scheme was consummated. Before, however, the company gave their consent and dismissed their suit for attachment, they procured from the partnership fund of Champion & Co. collateral security to fully indemnify and make secure their claim, and thus gained a preference over the other creditors.

The evidence is conflicting as to the secrecy with which this transaction was entered into, but it fully appears that but a small portion of the creditors were cognizant of it. This suit was brought to enjoin the company from selling the real estate, on which they had a deed of trust to secure them in their preference over the other creditors. The court below having given a decree dissolving the injunction and dismissing the suit, the cause is now here on appeal. There is but a single point to be passed on, and that is, did the taking the additional security by the Collier White Lead Company operate as a fraud on the other creditors and render the security void? Between the parties to the arrangement there may be no actual fraud, but the tendency is to defraud the other creditors; and therefore, on grounds of public policy, it is



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held to be constructively fraudulent, and condemned both at law and in equity. The purport of a composition is that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors according to the order and terms prescribed in the deed itself. In all transactions of this description the utmost good faith is required, as each one signs the deed and comes into the agreement on the understanding that they will share mutually, or according to the terms embodied in the instrument. But if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. (1 Story's Eq. § 378; Willard's Eq. 209.)

Every creditor has a direct interest that the agreement should be fairly performed. And where any creditor, unknown to the others, has obtained any benefit beyond what the others have obtained, the others are cheated and imposed upon, and the private contract entered into is a fraud on the arrangement, and any security given in pursuance of such contract is absolutely void, even against the debtor who may have given such security. (Cockshott v. Bennett, 2 T. R. 765; Eastabrook v. Scott, 3 Ves. 460; Mawson v. Stock, 6 Ves. 301; Ex parte Sadler, 15 Ves. 55; Leicester v. Rose, 4 East. 379; Jackson v. Davison, 4 Barn. & Ald. 695; Pendlebury v. Walker, 4 Young & Col. 424.)

The cases generally proceed on the ground that the transaction complained of was secret and unknown to the other creditors; but an instrument creating an obligation of preference may be valid if it form part of the original transaction and be communicated to the other creditors and they do not object. In Jackman v. Mitchell, 13 Ves. 581, Lord Chancellor Eldon said: "I remember the case of a person named Hebblewaite, who had made a composition with his creditors and secured the deficiency to one creditor by a bond, and that was held good in this court by Lord Thurlow; and it was part of the transaction that that dealing should not be kept secret, but should be communicated to the other

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creditors; and as they did not object, Lord Thurlow held it good." In that case the matter was brought home to all the other creditors, and, as they made no objection, their assent was presumed.

In the present case no such acquiescence appears. Many of the creditors or their representatives swear positively that they knew nothing about the arrangement, and there is no evidence tending to show that more than a very small minority of them had any knowledge of it. That a few had an understanding or impression of its existence cannot change the rules of law. Their claims may have been insignificant, or from other reasons they might have been satisfied, whilst the others would have interposed a decided objection. We are not at liberty to speculate by arithmetical calculation as to the probable effect the consent of a part would have in determining the fairness of the transaction or the rights of the parties. Besides the unbroken current of decisions in England, the American cases all support the views above indicated. (*Yeomans v. Chatterton*, 9 Johns. 295; *Payne v. Eden*, 3 Carnes, 213; *Wiggins v. Bush*, 12 Johns. 306; *Tuxbury v. Miller* 19 Johns. 311.)

The case of *Case v. Gerrish*, 15 Pick. 49, is almost precisely parallel with this; and *Shaw, C. J.*, seems to regard the rule as too clearly settled to require any argument.

The authorities cited by the respondents furnish no aid to their view of the law. In *Lee v. Lockhart*, 3 My. & Cr. 302, where the creditor had the benefit of his security, there was no contract or common purpose between the mortgagees and other creditors. There was, besides, an indorsement on the deed reserving to the creditor his right under his security, which was evidence of *bona fides* and of all absence of concealment.

In *Clark et al. v. White*, 12 Pet. 199, the court enunciated the very doctrine above laid down and enforced, and expressly says: "If, upon failure or insolvency, one creditor goes into a contract of general composition common to the others, at the same time having an underhand agreement with the debtor to receive a larger per cent., such agreement is fraudulent and void, and cannot be enforced against the debtor or any surety to it."

The agreement entered into in this case, by which the respond-

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ents obtained additional security and gained an advantage over the other creditors, is against public policy—such an one as the law deems constructively fraudulent—and must therefore be held incapable of enforcement.

The judgment will be reversed and the cause remanded. The other judges concur.\*

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JOHN HARDY, Appellant, v. JOHN MATTHEWS and JOHN F. HUMPHREYS, Respondents.

1. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 587, § 5), it must appear that she conducted the business or transaction about which she was testifying.
2. *Contract—Equity—Specific Performance.*—If a contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree a specific performance as it is to give damages at law.

*Appeal from St. Louis Circuit Court.*

This was an action, in the nature of a bill in equity, to enforce specific performance of a contract made by Matthews with Hardy to sell eleven lots of land on Washington avenue, between Beaumont street and Leffingwell avenue. An amended petition was filed June 21, 1866, setting up the contract, which bears date August 1, 1859, and is as follows:

“\$1000.

“ST. LOUIS, Mo., August 1, 1859.

“Received of John Hardy one thousand dollars for a piece of property situated on Leffingwell avenue one hundred and thirty-four feet eight inches, and one hundred and five feet on Washington avenue; and he, the said John Hardy, to give his notes for five thousand dollars—that is to say, one note for a thousand dollars, with six per cent interest, each and every year until paid.

“Witness, James K. Hardy.

JOHN MATTHEWS.”

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\* Motion for final judgment of perpetual injunction in this court was filed and sustained.

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“ST. LOUIS, MO., *August 1, 1859.*

“I have also sold to John Hardy one of seven (7) lots — that is to say, one hundred and eighty feet on Washington avenue, and one hundred and thirty-four feet eight inches on Beaumont street, the said Hardy giving his notes for ten thousand dollars, \$1000 every first of August, with six per cent. interest, until paid.

“Witness, James K. Hardy.

JOHN MATTHEWS.”

The original petition was filed September 20, 1861. The contracts or receipts above recited were on one piece of paper. At the former trial in the court below they were excluded on the ground that they contained no sufficient description of the lots intended to be sold. This court held them sufficient, and that parol evidence could be introduced to identify the lots intended. (38 Mo. 121.)

On the return of the case from the Supreme Court, plaintiff filed his amended petition asking for a specific performance of the contract. To this defendants replied, denying the making of any such contracts, or any sale of lands to Hardy, and also alleging that defendants had tendered a deed to plaintiff, which he had refused to receive. Also, that defendant Matthews had executed a lease to Hardy of a portion of the ground described in plaintiff's petition, at the annual rent of four hundred and fifty dollars, for four years from August 1, 1858, and that Hardy occupied the land under said lease, and had not paid the rent; and asked for judgment. Plaintiff, in reply, admitted the making of the lease and the occupancy of the ground under the lease for one year, and alleged that then, by agreement, said lease was canceled, and plaintiff did not occupy said premises under the lease after August 1, 1859; that said Matthews agreed that certain improvements required on said premises might be made by plaintiff, and the amount paid for them was to be taken in satisfaction of rents accruing under said lease; that plaintiff expended upon said premises and in paying for macadamizing, paving, etc., over nine hundred dollars more than the rent during the time plaintiff occupied said premises; that in 1860 defendant Matthews took possession of said premises, and had held them ever since. Plaintiff

denied that Matthews ever tendered him a deed in accordance with the terms of the contract; denied that he abandoned his contract, or that he ever refused to receive a deed under said contract.

John F. Humphreys was made a party to said amended petition on the allegation that, shortly after the making of said contract, Matthews conveyed or pretended to convey said lots to said Humphreys, who was his son-in-law, but that Humphreys had full knowledge of the sale to Hardy.

These allegations concerning Humphreys were not denied in the answer.

Plaintiff asked that Humphreys might be decreed to hold the property in trust for plaintiff under said contract, and that specific performance of the contract might be decreed.

Upon the trial of the cause, plaintiff introduced testimony showing an offer on his part, in 1861 or 1862, to pay for the land, partly in cash and partly in deferred payments; that the money was put in bank by him for that purpose; that he had deeds prepared conveying the property to himself; but that Matthews refused to make the deeds unless the whole payment was made in cash; that Matthews, at another time, acquiesced, but that his wife refused to sign the deeds.

Defendants, *contra*, offered testimony showing the making of two warranty deeds of the property to Hardy, dated respectively December, 1859, and July 17, 1861, and tender thereof to him, and refusal on his part to accept the same on the terms proposed. Proof was also introduced showing the lease of the property by defendants to plaintiff in 1858, and his occupancy thereunder; also, a deed conveying the property to John F. Humphreys, as trustee, in 1860, and conveyance by him of the same to Matthews in 1861. As to the agreement for rent of the premises under the lease in 1858 from Matthews to Hardy, and as to the value of the repairs, the testimony was conflicting.

Mrs. Mary L. Matthews, the wife of defendant John Matthews, was called by the defendants as a witness. Plaintiff objected, on the ground that she was the wife of defendant Matthews, and was not his agent in the transaction of any of the business from which this suit originated, and that she was not a competent witness;



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which objections were overruled, and said witness permitted to testify, to which decision of the court plaintiff excepted.

Witness testified that while living in Montgomery county, in October, 1859, Dr. Kinkle, during a temporary absence of her husband, came to her house for the avowed purpose of paying for the property in specie and notes, although she saw neither; that she signed a warranty and quit-claim deed to Hardy for the property; signed no others; made no objection to signing those.

The testimony in the case is voluminous, and need not be detailed.

*Geo. P. Strong*, for appellant.

I. The contract and identity of the land are clearly established by the testimony. There is no sufficient evidence that defendants ever offered to perform said contract. The contract being clearly established, it was for the defendants to prove an offer to perform and a refusal to accept a deed. The testimony being conflicting, there was no sufficient evidence to relieve the defendants from the obligation of the contract. The weight of evidence is clearly on the side of plaintiff, and the court erred in dismissing the bill. The contract being fair and reasonable, the court should have decreed a specific performance. (2 Story's Eq. §§ 748, 751, 771, 775.) This court will look into the whole case and weigh all the testimony, and correct the errors of the court below by rendering such a decree as the Circuit Court should have rendered. (*Goode v. Comfort*, 39 Mo. 313; *Allen v. Berry*, 40 Mo. 282.)

*Knox & Smith*, for respondents.

I. The respondents insist that the so-called contract relied upon by the appellant in this case is too vague, indefinite, and uncertain, to warrant a decree in this case in favor of appellant; that the evidence shows no right of the appellant to the relief which he seeks; that the respondents were not in default, but offered to give appellant sufficient deeds for this property in question long before this suit was instituted, which plaintiff refused to receive; that the evidence shows that appellant never offered respondents the money which he admits he was to pay respondents

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for the property, nor the notes which were to be given on the deed of trust to secure said notes, which appellant testifies he was to give to respondents. The evidence plainly shows that, when appellant thought the property worth more than he claimed the contract price to be, he was anxious to have the property; and when it was of less value than said price, he repudiated the contract and refused to receive the property.

WAGNER, Judge, delivered the opinion of the court.

There is some conflict in the evidence in this case, as might reasonably be expected where the principal witnesses are the parties to the record or directly interested in the result. The objection raised to the admissibility of the testimony of Mrs. Matthews should have been sustained. It is not shown nor is it pretended that she in any wise conducted the business or transaction about which she was testifying; and this is essential to qualify her as a witness under the statute. The dismissal of the bill by the court below was equivalent to saying that the plaintiff should be debarred from all equitable relief. A distinguished English equity judge has remarked that, if a contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree a specific performance as it is to give damages at law. (Sir William Grant in *Hall v. Warren*, 9 Ves. 608.) And this is now the universal and well-settled doctrine of equity jurisprudence.

In the present case there is neither exhibited unfairness, inadequacy of consideration, nor incompetency of parties. It is incontestable that for a considerable time after the making of the contract the plaintiff was anxious and willing, and did all he could, to perform his part and comply with the agreement. The default was altogether on the side of the defendants. It was the duty of the defendants to tender a deed according to the terms of the contract, and they had no right to couple the tender with any conditions not contained in the original stipulation. There is some evidence that the tender was made and that the plaintiff was not ready or refused to carry out the agreement. But the evidence was not sufficiently satisfactory, in our opinion, to justify the conclusion

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that the plaintiff had abandoned the contract or that he should be deprived of all equitable relief.

We think that the court erred in admitting testimony, and we are not satisfied with its finding on the facts.

Judgment reversed and the cause remanded. The other judges concur.

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THE TRUSTEES OF WESTMINSTER COLLEGE, Plaintiffs in Error, v.  
ESTATE OF H. R. GAMBLE, Defendant in Error.

1. *Contract — Endowment — Subscription.*—An agreement to contribute to an endowment fund when a certain sum of money is raised as a capital will be enforced where the capital to that amount consisted of interest-bearing notes made by persons of unquestioned solvency; and the money need not be actually paid in. The amount was raised in accordance with the condition of such promise when the same was assured by the undertaking of solvent and responsible obligors.

*Appeal from St. Louis Circuit Court.*

*Lackland & Martin*, for plaintiffs in error.

*Dryden & Lindley*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff, an institution incorporated by the laws of this State, presented to the Probate Court for allowance a demand against the estate of H. R. Gamble, deceased. The Probate Court rejected the demand, but upon appeal to the Circuit Court judgment was rendered for the plaintiff, and the case is brought to this court by writ of error. The following is the instrument presented for allowance, and upon which the Circuit Court gave judgment:

“ST. LOUIS, February 16, 1856.

“When twenty thousand dollars, including the amount herein specified, are raised as a capital to endow the Potts professorship in Westminster College, I promise to pay the trustees of Westminster College one thousand dollars as a part of the endowment of said professorship, and be used only for that purpose.

“(Signed)

H. R. GAMBLE.”

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On the trial it was testified by the general and financial agent of the college that on the first day of October, 1858, over twenty thousand dollars had been raised as a capital to endow the Potts professorship in Westminster College, and that the same was at interest for the benefit of the professorship. He also testified that the said professorship was regularly established in the college in 1859, and had continued up to the present time. Upon cross-examination he stated that the capital of twenty thousand dollars was raised by the friends of the college executing their notes with interest, some bearing interest from date, others to become due and bear interest when the whole amount was raised. The defense is based exclusively upon the assumption that the promise was made upon the condition that the amount should be raised—that to satisfy this condition the money must be actually paid in, and that taking notes or obligations for the endowment fund was not a sufficient compliance with the terms of the contract to fix any liability on the defendant. We must endeavor, if possible, to ascertain what the parties themselves meant and understood by the language they employed. The intention must be gathered from the terms used in the agreement, with particular reference to the subject matter. It cannot depend so much upon any formal arrangement of words as on the reason and sense of the thing to be collected from the contract and the matter to which it relates. The object was to endow a professorship, and the means proposed to accomplish the end was to raise the endowment fund by individual subscriptions or promises. The agreement was to pay when a certain amount was raised. It is not stated that the sum should be raised in money. Nor do we think the word, taken in the connection in which it is used, necessarily implies *ex vi termini*—that such was intended to be its meaning. Wherefore should the money be paid up? The principal was not intended to be used to support the professorship, but the interest resulting therefrom. Had the money been paid, it would then have been necessary to loan it out on interest to carry out the purpose contemplated. We apprehend there can be no essential difference, as far as the liability of the defendant is affected, whether the money was paid in and loaned out on interest to secure the object of the donation,

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or whether the amount was raised by the obligations of persons of undoubted solvency, bearing interest. The result is the same. Defendant's promise was not binding till a specified sum was raised from other sources; others contracted with like conditions; and the interpretation contended for would completely invalidate everything done touching the transaction, and abolish the established professorship *in toto*. The amount was raised in accordance with the condition of the promise, when the same was assumed by the undertaking of solvent and responsible obligors. That such was really the intention of the parties there can be but little doubt, when we consider the manner in which schemes of like description are generally built up. The evidence shows that the amount has been raised by the obligations of persons of unquestioned solvency, and that the professorship has been established and kept in operation.

This, we think, abundantly fulfills all the stipulations and conditions required by the contract, and the judgment should be affirmed. The other judges concur.

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CHARLES JONES, Defendant in Error, v. GEORGE W. MOORE and  
BENJAMIN F. HICKMAN, Plaintiffs in Error.

1. *Practice—Defenses and counter claims, how distinguished.*—A counter claim, as understood in the act relating to practice in civil cases (Gen. Stat. 1865, chap. 165, §§ 12, 13), must be of the nature of a cause of action at law. Different defenses or counter claims may be separately stated in the same answer; but equitable matter—that is, an equity of relief—can constitute a defense only, but not properly a counter claim. If it be not a defense, it can not be joined in the same suit with a cause of action at law.
2. *Practice—Counter claim; what cause of action not.*—A cause of action which wholly defeats the demand of the plaintiff cannot be a counter claim.
3. *Practice—Recoupment and set-off, what.*—A recoupment or set-off is not of the nature of a defense or plea in bar, but admits the cause of action and claims an allowance in diminution of the plaintiffs' demand, and it is not a counter claim.
4. *Practice—Trial—Matters of Law and Equity to be tried separately.*—Where a matter of equity and an action at law are separately stated in the same petition or answer, the matter of equity and the matter of law must necessarily be



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separately tried or heard, for the reason that there is a constitutional right of trial by jury in the one case and not in the other, and the nature of the judgment or relief given must in general be very different.

5. *Evidence—Original Deed of Trust and certified copy—Variance.*—Where notice of the sale of real estate under a deed of trust was published in a locality required by the deed, and all parties concerned in the sale had actual notice thereof, the publication was sufficient, although the certified copy of the record of the deed from the recorder's office made it appear that notice was to be published elsewhere; and the parties to the instrument must be held bound by its true reading.

*Error to St. Louis Circuit Court.*

This was a suit brought by Jones, defendant in error, against Moore and Hickman, plaintiffs in error, upon two promissory notes for \$1,500 each, payable to the order of James W. Wilson. To secure payment of the notes, Moore and Hickman executed to James M. Ming, as trustee of Wilson, a deed of trust on certain land in Franklin county. Hickman and Moore subsequently, in 1860, sold the land to Josiah Thornburgh, who assumed payment of the incumbrance. Wilson, the payee of the notes, indorsed the same to the plaintiff, Jones, who commenced suit in 1863, after the notes matured. After the commencement of the suit, Thornburgh conveyed the land to Hickman, who filed a supplemental and amended answer, alleging, among other things, that by the terms of the deed of trust, if the notes should not be paid at maturity, then the said Ming or his legal representative, or the sheriff, might sell the property or any part thereof at public vendue, to the highest bidder, at Union, in Franklin county, for cash—first giving thirty days' public notice of the time, terms, and place of the sale and of the property to be sold, by advertisement in some newspaper printed in St. Louis and Franklin county. The answer alleged that Ming had not followed the power given him by the deed of trust; that he had not advertised the sale in any newspaper printed in St. Louis; but at the instance of Jones, the owner of said notes, he caused an advertisement to be published in some newspaper printed in Franklin county, that he would, on the 28th day of November, 1861, in the town of Union, county of Franklin, proceed to sell said real estate; that on the day and place appointed said Ming exposed the same for sale in a lump, and that the same was pur-

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chased by Jones for \$2,700; that by collusion with Jones he had prevented the land from bringing a fair price at the sale by demanding payment of the bid in gold coin *instantly* upon striking off the property to the highest bidder; that on account of the condition of the country it was unsafe for a man to take the amount due upon the notes in coin to Union at the sale; that he had made arrangements for the coin, and had the same in bank at St. Louis, to meet the amount of the bid; that he sent an agent to bid for the property at the sale, with authority to state that the gold was in bank to meet the bid and would be forthcoming; and that Jones, the plaintiff, at the sale publicly stated and declared that gold would be required immediately upon declaring the land struck off; and that Ming, the trustee, allowed himself to be controlled by Jones; and that by these means Jones bought the land for \$2,700, when it had cost \$8,000 and was worth that sum or more. The answer set out substantially the same averments as the petition in *Thornburgh v. Jones*, 36 Mo. 515.

Plaintiff filed his replication denying most of the matter set up as a defense in defendant's answer.

At the trial the plaintiff presented the notes and rested his cause.

The defendant read in evidence a copy of the deed of trust to Ming as trustee, dated April 25, 1859, duly certified from the record of deeds in Franklin county, requiring the advertisement to be published in some newspaper published in "St. Louis Franklin county." The plaintiff, in his rebuttal, produced the original deed, which appeared to read "St. Louis *or* Franklin county," and evidence was given to show that this word "*or*" was in the original at the time it was written, and consequently that the recorder, in recording the deed, had committed an error.

The proof shows that the sale was made November 28, 1861, at Union, in Franklin county, and notice was published in a newspaper published or printed at Washington in said county.

Defendant then called several witnesses, who testified as to the condition of affairs caused by the rebellion, and that it would have been unsafe for persons to travel with a large amount of gold through Franklin county.

Testimony was given to show how the sale was conducted, and

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that Ming, the trustee, allowed Jones to proclaim that payment of the bid in gold would be required *instantly*; and that, when spoken to before the sale and shown a letter to give assurance that upon the bid of Hickman's agent the gold would be paid, he expressed a willingness to accept the bid, but was afraid of the plaintiff, Jones. Testimony was offered going to show that, but for the proclamation of Jones, the property would have been bid up to \$4,000 or \$4,500. The defendant also offered testimony to show that the value of the property was about \$8,000.

Plaintiff offered testimony in rebuttal as to the condition of the country, and as to the value of the property and the conduct of the sale. He also offered in evidence a notice he had served upon defendant Hickman, offering him the property for the amount due upon the notes and that bid at the sale and the expenses.

*G. C. Whittelsey*, for plaintiffs in error.

I. At the date of the sale by the trustee, Thornburgh was the owner of the land, and as to him the deed as it was recorded showed the powers of the trustee, and he had notice only of the deed as it stood of record. As the trustee did not pursue the powers as recited in the recorded deed, the sale was void, and Thornburgh had a right to redeem the land from the purchaser after the sale, and his deed conveys the right of redemption. (Thornburgh v. Jones, 36 Mo. 514; Le Neve v. Le Neve, 2 Wh. & Tud. L. C. Eq., ed. 1852, Am. Notes, 125; 2 Am. Law Reg., N. S., October 1863, §§ 21, 22.)

II. Hickman, as a purchaser from Thornburgh, is protected as a purchaser through a purchaser without notice. (Bassett v. Nosworthy, 2 Wh. & Tud. L. C. Eq., ed. 1852, Am. Notes, p. 50.)

III. The conduct of the trustee, Ming, and of the *cestui que trust* and purchaser, Jones, was oppressive, unjust, and unequitable.

*Jones*, for defendant in error.

I. The points relied on by defendants, Moore and Hickman, in this action, are, first, that the advertisement by which the land was to be sold was to be in some newspaper printed in St. Louis

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and in Franklin county, and that such was the understanding of Wilson and defendants, Moore and Hickman, and that the word *and* was omitted. To overthrow this allegation, the original deed of trust is interposed and offered in evidence to the tribunal trying the case, by which it is seen that the instrument referred to by defendants was not a true copy of the original, and that it was provided in the original deed of trust that said notice should be published in some newspaper published in St. Louis *or* Franklin county. H. R. Sweet, who drew the deed of trust, was present, and was examined by the defendants, and was their own witness, and he stated that he wrote the deed, and that he made the original deed as it is offered, with the word "*or*" in it, and gave as his reason for so writing it that there were times when there was no newspaper published in Franklin county, and that when there were none it might be published in St. Louis county. No objection was made to the publication of it prior to the sale.

*Glover & Shepley*, for defendant in error.

I. There is nothing saved by the record and assignment of errors upon which to ground a judgment of reversal. 1. The suit was a suit at law to recover the amount due upon three promissory notes made by said defendants to one Wilson and indorsed to plaintiff. The fact that the notes were secured by a deed of trust upon certain land out of the actions and doings of the trustee and the plaintiff in the sale of which the defendants alleged they had a defense to said notes, did not turn the case into a suit in the nature of a suit in equity. It is not in the power of the defendants to change the nature of a suit by the character of the defense. The record shows that both parties considered it a suit at law by waiving a jury. 2. If, then, the suit was a suit at law, there is here nothing preserved for the court to consider. The assignment of errors asks for a reversal only on the ground that the judgment was for the wrong party; that it should have been for defendants instead of plaintiff. There were no instructions asked — nothing upon which the court was asked to pass and declare what the law of the case was; therefore, there is nothing presented here upon which the court can pass.

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II. Even if the answer presented a defense to the suit, yet the evidence in the cause effectually disposed of all the equities set up in the answer of defendants; for, 1. The evidence fails to show that any deception was practiced upon the defendants. 2. The evidence clearly shows that there was no unfairness, or advantage taken of defendants at the sale.

III. The facts set up in the answer, if they were true to their fullest extent, constitute no defense to this action. The facts set up are not a defense to the notes; but, on the contrary, they admit the indebtedness—insist upon it—insist that the sale of the property was void, so that no part of the notes was paid thereby; so that clearly there is nothing therein stated that is a defense to the notes. Neither is there anything which is or can be a counter claim. There is nothing that can be set off by way of damages or by way of recoupment. The sale is either good or it is bad. If good, then defendants have no cause of complaint; if bad, no title passes to the land.

HOLMES, Judge, delivered the opinion of the court.

This was a suit upon promissory notes, by the holders against the makers, upon a petition in the usual form. The answer of the defendants admitted the execution of the notes, and set up equitable matters as a defense. The cause was heard before a court, a jury being waived. The issues were found for the plaintiff and the damages assessed, and judgment was given for the plaintiff for the amount, with a further judgment that "the defendants take nothing by their counter claim." In the answer the defense set up was a counter claim, which, besides the equitable relief prayed for, asked for a recoupment of damages.

The statute provides that the answer may consist of a statement of any new matter constituting a defense or counter claim. It may contain "as many defenses or counter claims as the party may have," whether legal or equitable, or both, and they must be separately stated. A counter claim must be a demand existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the action, and it must arise out of the same contract or transaction and be founded on con-



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tract. It is evident from this that a counter claim must be of the nature of a cause of action at law. Different defenses or counter claims may be separately stated in the same answer; but equitable matter—that is, an equity for relief—can constitute a defense only, but not properly a counter claim. Equity may afford relief in some cases by decreeing the payment of money or a compensation by way of damages, and in some very special cases may perhaps direct an assessment of damages, but the jurisdiction must be founded upon some equity. That equity may be a defense to the cause of action at law, or it may not. If it be not a defense, it cannot be joined in the same suit. A cause of action which wholly defeats the demand of the plaintiff cannot be a counter claim. (*Hobson v. Pierce*, 12 N. Y. 156; *Post v. Sprague*, 12 How. Prac. 455; 1 *Smith & Tiff. Prac.* 378.) These authorities do not support the idea that an equitable defense may properly be called a counter claim. A defense may be either legal or equitable, and different consistent defenses may be separately stated in the same answer. (Gen. Stat. 1865, ch. 165, §§ 12–14.)

This answer contained an equitable defense, but not a counter claim. A recoupment or set-off is not of the nature of a defense or plea in bar, but admits the cause of action and claims an allowance in diminution of the plaintiff's demand, and it is not a counter claim. The effect of the judgment that was rendered may be taken to have been that the defense on the equity was adjudged against the defendants as upon the dismissal of a bill.

It has been held by this court that where a matter of equity and an action at law are separately stated in the same petition or answer, the matter of equity and the matter of law must necessarily be separately tried or heard, for the reason that there is a constitutional right of trial by jury in the one case and not in the other, and the nature of the judgment or relief given must in general be very different. (*Peyton v. Rose*, 41 Mo. 261.) The statute recognizes this difference in the mode of trial. (Gen. Stat. 1865, ch. 169, § 13.) Here the parties appear to have consented that both matters might be heard together, and the right of trial by jury was waived. No exception is taken to this action of the court.

The equitable defense consisted in an allegation of fraud and unfairness at the sale of the property upon which the notes sued on had been secured by deed of trust, the plaintiff having been the purchaser, and the relief prayed for was that the trustee's deed to the purchaser might be declared void, and the defendants allowed to redeem the property upon payment of the whole debt and interest (these notes inclusive), and that an account might be stated and an injunction granted to stay further proceedings at law. It is apparent that if this relief could have been granted it would have constituted a complete defense to the plaintiff's cause of action. One objection to the sale was founded upon an alleged insufficiency in the publication of notice. It appeared that the original deed of trust required that the property should be advertised for sale "in some newspaper printed in St. Louis or Franklin county," and that the notice was published in the "Franklin County News," a newspaper published in Franklin county. The certified copy of the record of this deed, from the recorder's office of the county, made it appear that the deed read "in St. Louis Franklin county." In the case of *Jones v. Thornburgh*, 36 Mo. 514, the allegation of the petition upon which the case was decided on demurrer made it read "*in St. Louis and Franklin county.*" In this case it appears that the notice was published as required by the deed. The parties to the instrument must be held bound by the true reading. All parties concerned in the matter of the sale appear to have had actual notice, and for all the purposes of this case the notice will be deemed to have been sufficient.

The evidence failed to support the averment of fraud and unfairness at the sale. It does not appear that the beneficiary and purchaser did anything more than he had a lawful and just right to do. His demand that the sale should be made for cash, payable in coin rather than in currency at a discount, was in conformity with the terms of the deed and with the requirements of law. This alone would furnish no ground for relief. (*Goode v. Comfort*, 39 Mo. 326.) The proof does not show that this demand was made oppressively for the purpose of deterring bidders, nor that any persons were prevented from bidding, nor that the property was obtained for much less than its real value at that

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time. The parties interested in preventing a sacrifice of the property were present and had a full opportunity of bidding, and their bids to the amount they were willing to go were accepted, and they were informed by the trustee that a reasonable time would be allowed for an examination of the title, the execution of the deed, and the payment of the money. They might have prevented a sale altogether by paying the debt due. Even after the sale had taken place, the plaintiff offered to give up his purchase upon receiving full payment of his debt. The disturbed condition of the times was not such as to furnish any valid excuse for the delinquency of the defendants in the payment of the notes. We do not see that the facts and circumstances proved amounted to any fraud or unfairness that could furnish a sufficient ground for relief.

The judgment will be affirmed. The other judges concur.

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THE ST. LOUIS BUILDING AND SAVINGS ASSOCIATION, Appellant,  
v. JOHN H. LIGHTNER, Collector, etc., Respondent.

1. *Revenue Act—Construction.*—Sections 19 and 20 of the revenue act of 1863 (Adj. Sess. Acts 1863, p. 69) contemplate an assessment on shares of stock held and owned by individual persons.
2. *Revenue Act—Design.*—The manifest object of these provisions was that the assessor might be thus provided with authentic information as to the persons who owned shares of stock in the corporation, in order that the shares might be properly assessed against them.
3. *Corporation—Capital Stock—Taxation.*—That portion of the capital stock of a corporation which has been invested in bonds of the United States is not subject to taxation by the State.

*Appeal from St. Louis Circuit Court.*

On the trial of this cause, plaintiff asked the court to give the following instruction, which was refused: "If the court find from the evidence in the cause that the plaintiff had invested \$70,500 of its capital stock in the bonds of the Government of the United States, and that the said amount of capital stock so invested was by the assessor of St. Louis county assessed for taxation under the State law, and the tax book containing said assessment was

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placed in the hands of the defendant as collector of said county, and that the levy and seizure admitted in the defendant's answer were made to collect the tax on such assessment and no other tax, and by no other authority than such tax bill conferred, then said levy and seizure were contrary to law, and the plaintiff is entitled to recover."

*Gardner, and Glover & Shepley, for appellant.*

I. The *onus probandi* was on the defendant. (Blackw. Tax Tit., ed. 1855, pp. 84 to 112 inclusive.)

II. The assessment of the tax in this case, by virtue of which the defendant, Lightner, attempts to justify his trespass, was an assessment on the capital stock of the corporation, and not on any shares therein. The list of property delivered by the plaintiff to the assessor in respect to this matter (see § 7, art 2, Rev. Act, Adj. Sess. Acts 1863, p. 68) is in these words: "The capital stock of this association, on the 5th of September, 1864, was \$292,600, of which capital stock the association had invested on that day, in United States bonds exempt from taxation by law, \$70,500." On the foot of this list is an affidavit signed by Felix Coste, president of the plaintiff, "that the above is a true and correct list of all taxable property (except merchandise and shares of stock in incorporated companies) owned by him or under his charge on the first Monday of September, 1865." This is not a list of shares of stock—1. Because it does not speak of any shares of stock, but of the capital stock of the association only. 2. Because the affidavit of Mr. Coste, president of the corporation, who made this list of property on which the tax was to be levied, says, in so many words, it is a true list of property owned by him or under his charge, except shares of stock in incorporated companies. 3. Because the law points out how a list of shares shall be made out and delivered to the assessor, and this list is not so made out in any particular. See Adj. Sess. Acts 1863, p. 69, § 19, where it is said the president or chief officer of such corporation shall deliver to the assessor a list of all shares of stock held thereon, and the names of the persons who held the same. This was not done. It is, therefore, not a list of stock

shares. And if it was a list of shares, omitting the owner's name, as it does, would avoid the list, and any assessment of tax on it would be void for want of the owner's name. When the statute requires an owner's name to appear, and it does not, the assessment is void. (Blackw. Tax Tit., ed. 1855, p. 173.)

III. The twentieth section of the last-mentioned act again assumes the necessity for such list, and shows why the law requires it to be made. It is in order that the corporation which is to pay the tax shall be permitted to recover from the owners of the shares whose names are inserted in the list so much of the tax as may belong to those persons. Should any controversy arise about who are owners of any particular shares, such shares may be identified in this way. If the corporation were compelled to pay this tax as duly assessed on the shares of the stockholders, the tax could never be recovered from any stockholder as provided in section 20, for the names are the only means provided by the law for learning who the owners are. If any man is returned in a list so made as an owner of shares when he is not, he may appeal (see § 38 Adj. Sess. Acts 1863, p. 71); but if this is a list of shares, the right to such appeal is cut off.

IV. The law must be complied with, or the list is void. "The list is the foundation of all the proceedings;" and if illegal no assessment can be based on it. (Blackw. Tax Tit., ed. 1855, pp. 133, 130.) It is essential to the validity of titles under a "tax sale." Of course, if it is invalid, there is no power to collect. (*Id.* 137.) The assessment lists must be legal, or taxes cannot be laid on them.

V. The listing for taxation, being for the property of the corporation (its capital stock), was contrary to the statute of Missouri, and was void. No property of any corporation, save that of manufacturing companies, was taxable at the date of this list (Adj. Sess. Acts 1863, p. 65, § 1), unless it was in excess of capital stock. The listing for taxation being for the capital stock of the corporation, and not for any shares therein, and \$70,500 of that capital stock being bonds of the United States, the same was void, as not subject to State taxation. (Bank Tax Case, 2 Wal. 200; Bank of Commerce v. New York City, 2 Black, 620.)



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*H. A. Clover*, for respondent.

I. The tax imposed by the law of Missouri at the time of the tax levied upon the plaintiff was not a tax upon the bank, or upon the banking capital of the bank; therefore, any portion of the capital of the bank invested in government securities cannot be regarded as having been taxed, and the principle of the decisions in 2 Black and 2 Wallace has no application whatever to the case at bar.

II. The State authorized the taxation of shares of stock in incorporations, and the shareholders were and are responsible for the payment of the tax as shareholders. The revenue law of Missouri, at the time of the levy of the tax complained of, prescribed the levy of a tax upon this object (Rev. Act of 1863, §§ 19, 20, 21; Adj. Sess. Acts 1863, p. 69.)

In the case of *The People of New York v. Commissioners*, in 2 Black, 620, New York levied a tax upon the capital of the bank, and as a portion of that capital was invested in government securities, it was held that a tax laid upon that portion of the capital was a tax upon the securities of the United States, and therefore unconstitutional; but the court said: "It is agreed the tax (levied by the State of New York, and which is the subject of review in the case) is upon the property constituting the capital." In *Van Allen v. The Assessors*, 3 Wallace, 573, the Supreme Court, to justify the taxation of shares of stock of the National banks at their full value, making no distinctions for portions of the capital of the bank invested in government securities, asserted and maintained a distinctive difference between shares of stock in a bank and the capital stock of a bank. (33 N. Y. 238.)

The shareholders in the National banks are taxed by the State upon the full value of their shares without regard to the amount of the capital of the bank invested in government securities, and this is an attempt to put the shareholders in State banks upon a better footing than is held by the shareholders in the National banks. The State, it must be admitted under the authority of 3 Wallace, may tax the interest of the citizens in a bank created outside of its own authority to the fullest extent, without regard

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to the character of the investments of the capital of the bank, and yet cannot, it is urged, tax that interest to the same extent in a bank or institution existing and drawing the breath of life by its authority. (*Bank of Commerce v. New York*, 2 Black, 628; *B'k Tax Case*, 2 Wal. 200; *Van Allen v. The Assessors*, 3 Wal. 573.)

HOLMES, Judge, delivered the opinion of the court.

The object of the suit is to recover back money which it was averred had been unlawfully levied upon and seized by the defendant, the collector of taxes, under a tax bill issued against the corporation.

The president of the company was called upon to deliver to the assessor a written list of the property taxable by law to the corporation. A list was furnished, in which the capital stock was set down at \$292,600, whereof a part, amounting to \$70,500, was invested in the bonds of the United States, which, it was claimed, were not subject to taxation by the State. The assessor, being of the opinion that there was no exemption, levied the taxes upon this part of the capital stock separately, under the name of "shares of stock in incorporated companies." The tax bill was paid and receipted by the collector for the amount of the taxes levied, less the item assessed upon these bonds of the United States, which was "left to be determined by legal authority." The plaintiff refusing to pay this item, the collector proceeded to make a seizure of bank notes to the amount of the demand.

This was clearly an assessment against the corporation in respect of its capital stock, and nothing more. It is conceded on both sides that the capital stock of the corporation invested in the bonds of the United States was not subject to taxation by the State. (*Bank of Commerce v. New York City*, 2 Black, 620; *Bank Tax Cases*, 2 Wal. 200.)

But the defendant contends that this was an assessment and levy of taxes upon "shares of stock" under the provisions of the revenue act of 1863. (*Adj. Sess. Acts 1863*, p. 69, §§ 19, 20.) These provisions contemplate an assessment on shares of stock held and owned by individual persons. These persons are made taxable by law in respect of the shares of stock owned by them in

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the corporation, but the act, instead of requiring them personally to give in a list for taxation, made it the duty of the president or other chief officer of the corporation, when called upon by the assessor, to deliver to him "a list of all shares of stock held therein, and the names of the persons" who held the same. The manifest object of this provision was that the assessor might be thus provided with authentic information as to the persons who owned shares of stock in the corporation, in order that the shares might be properly assessed against them. There would be no rational meaning in any other construction.

In this case there was no attempt to assess shares of stock against the persons owning them. The assessment was made against the corporation, the assessor being of the opinion that the government bonds were subject to taxation, either as shares of stock or as a part of the capital stock of the corporation. It was called "shares of stock," but the thing intended must have been capital stock, and could have been nothing else. To call this "shares of stock" would be simply an irrational use of words. Things are not changed by giving them wrong names. The statute itself is expressed in vague and indefinite terms. The twentieth section provides that the taxes assessed on shares of stock, against the persons owning them, shall be paid in the first instance by the corporation, to be then recovered from the owners of the shares or deducted from the dividends accruing on such shares. Whatever might be said of this mode of collecting taxes, we are not now required to give an opinion upon its operation, effect, or constitutionality. It is enough for all the purposes of this case that there was no assessment nor any attempt at an assessment of taxes in the manner contemplated by these special provisions.

According to the authorities, that portion of the capital stock of the corporation which was invested in the bonds of the United States was not subject to taxation by the State. The assessment, levy, and seizure for this item of the tax-bill were therefore wholly without any authority of law, and the plaintiff's instruction should have been given.

Judgment reversed and the cause remanded. The other judges concur.

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ZIBA H. KITCHEN, Respondent, v. FREDERICK REINSKY and  
JAMES BROWN, JR., Appellants.

1. *Practice—Trial—Affidavit—Admissions—Subsequent Trial.*—Plaintiff claimed certain property as purchaser at assignee's sale, and at the trial defendant obtained a continuance upon affidavit that testimony had been discovered, too late to be used in the trial, to prove that "one of the assignors" "was insolvent at the time he made the assignment, and that he made the same to hinder and delay creditors, and that the same is void;" but plaintiff elected to go into trial, and admitted the facts stated in the affidavit, and the case proceeded: *Held*, that at a subsequent trial of the same cause, such former admission of counsel could not be used in evidence, and the action of the court in excluding it operated no surprise to defendant, and constituted no ground for new trial. Plaintiff at most simply admitted that the statements of the affidavit were to be regarded as proved for the purposes of the previous trial. The admission was not in any sense one of record, and stood upon the same ground precisely as if the absent witness had himself been present and testified to the facts stated in the affidavit; and the fact that the admission was preserved in a bill of exceptions does not alter the case.
2. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*—Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.
3. *Partnership—Assignment—Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.

*Appeal from St. Louis Circuit Court.*

Defendant at the trial asked the following instructions which were refused by the court: "1. The assignment of Cochran & Pollack to Stewart and Fiske was inoperative to pass any title to the land in question. 2. The deed of Stewart and Fiske, acting as assignees of John Cochran in New York, to the plaintiff, was inoperative to pass any title to the land in question. 4. The

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admission made by plaintiff's attorney at a former trial of this cause, and made of record, that 'Cochran was insolvent when he made the assignment,' then and now offered in evidence, and 'that the same was made to hinder and delay creditors,' and 'that it was void,' and 'plaintiff's claim under said assignment was void,' is conclusive against the plaintiff, and he is estopped from claiming any title under said assignment."

The third instruction asked by defendant was given by the court, as follows: "3. Defendants' title relates back to the 2d of March, 1860, to the date of the attachment and levy at the suit of Robinson & Parsons against Cochran, and the conveyance of Cochran to plaintiff, dated September 1st, 1860, was inoperative to pass any title to the land in question as against the purchasers under the attachment sale."

*John. P. Hudgens*, for appellants.

The first and second instructions asked by defendant and refused by the court comprehend the entire issue involved in the case, and are in brief—1. Did the foreign voluntary assignment of Cochran & Pollack, made in the State of New York, without any compliance with the *lex loci rei sitæ*, pass title to the assignees, Stewart and Fiske, to land in Missouri, belonging to John Cochran? 2. If the first proposition be affirmed, then did the deed of the assignees, Stewart and Fiske, made in New York, "under and by virtue of the assignment," and as such assignees, to the plaintiff, without any pretense of compliance with the *lex loci rei sitæ*, which requires the filing of an inventory and bond in the St. Louis Circuit Court, and procuring an order of the same as a prerequisite to their right to sell and convey realty under the assignment, pass any title to plaintiff?

I. There are two classes of assignments known in law: 1. Statutory or bankrupt assignments. 2. Voluntary assignments. Both are for the benefit of creditors, and governed by the same rules as it respects real estate. The latter is a substitute for the former. (Bur. on Assign. 5, 16; 2 Kent's Com. 532; 1 Sm. & M. 207, 258; 27 Mo. 528; Story Conf. Laws, § 423 a.)



II. The *lex loci rei sitæ* governs all contracts for or conveyances of real estate, and unless such are made in conformity and compliance with the *lex loci rei sitæ* they are invalid. (Story Conf. Laws, §§ 435, 427, 428, 555, 363, 364; United States v. Crosby, 7 Cranch, 115; 10 Wheat. 192; 9 *id.* 566; 11 *id.* 465; 11 Mo. 318; Bur. on Ass. 360-2.)

III. The assignment of Cochran & Pollack is a "voluntary assignment," within the meaning of "an act concerning voluntary assignments" in force in the State of Missouri at the time said assignment was executed, and as such must conform to all the provisions of said act as the *lex loci rei sitæ* governing in this case: 1. Because it purports on its face to be an assignment for the benefit of creditors to Stewart and Fiske "as assignees." 2. The assignees accept the trust "as assignees" and "agree in all respects to conform to the provisions thereof under the law." 3. It provides for the payment of six classes of preferred creditors with the residue to be returned to John Cochran. 4. The assignees, by their deed to plaintiff, declare that they make it as assignees under the assignment, and by virtue of authority under the assignment. (Manny v. Logan, 27 Mo. 528; 45 Barb. 317; 10 Paige, 461, 445-8; 7 Gill. & Johns. 480; 40 Penn. St. 269; 20 Ohio, 389, 400; 31 Mo. 301.)

IV. As a foreign voluntary assignment it was inoperative to pass title to land in Missouri, and the first instructions asked by defendants and refused by the court should have been given with a verdict for defendants. (Bur. on Ass. 360-2; Story's Conf. Laws, §§ 423 *a*, 428, 435; 3 McLean, 399; 18 Pick. 245-7; 10 Wheat. 202; 2 Ohio, 488; 11 Mo. 314-18; 7 Gill. & Johns. 480; 10 Iowa, 282; 6 Mo. 302.)

V. The second instruction asked by defendants and refused by the court should have been given. The deed of the assignees to plaintiff, made in New York, under proceedings in New York, without compliance with the provisions of the "act concerning voluntary assignments" in Missouri, as the *lex loci rei sitæ*, was inoperative and void: 1. Because the assignees took no title, by virtue of the assignment, to the land in question, and had no title to convey to plaintiff. 2. Because the assignees do not pre-

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tend to have filed an inventory and given bond to the Circuit Court of St. Louis county, nor procured an order from this Circuit Court for the sale, as an indispensable prerequisite to their right to sell or convey the premises in dispute; and such compliance with the *lex loci rei sitæ* must appear affirmatively, or no title can pass. (Manny *et al.* v. Logan, 27 Mo. 528, above referred to; Cleveland v. Boerum *et al.*, 27 Barb. 252; Story's Confl. Laws, §§ 435, 364-5, 424-7; 1 Pick. 81; 1 Paige, 220; 11 Am. Jur. 403; 1 Green, New Jer., 326; 16 Abb. Pr. 23—case in point.)

VI. The assignment is void by the statute of frauds both of New York and Missouri, because it creates a trust to the use of one of the assignors, John Cochran, without providing for the payment of all his debts. (R. C. 1855, p. 802, § 1; Rev. Stat., N. Y., 219-20, § 1; Bur. on Ass. 179, 430; 6 Hill, 438; 26 Mo. 423; 5 Cow. 584; 4 Comst. 211; 13 Wend. 243; Robinson v. Robards, 15 Mo. 459; Brooks v. Wimer, 20 *id.* 503.)

VII. The assignment is void because it appropriates the individual property of John Cochran to pay the individual preferred creditors of Pollack, and also of Abbott, to the exclusion of Cochran's individual judgment creditors. The property conveyed is described as follows: "All the real estate and personal property, of whatever description and wherever situate, etc., belonging to the said John Cochran and Robert G. Pollack, or either of them, or in and to which the said John Cochran and Robert G. Pollack, or either of them, have any interest, title, claim, or demand whatever, to have and to hold the same in trust, etc. \* \* Third, to pay off all the debts due and owing by the said firm of Cochran & Pollack, or the late firm of Abbott, Cochran & Pollack, or either of the members of said firms, to Cornelius Fiske." Abbott is not one of the assignors, and no reason appears why his individual debts to Fiske or the other preferred creditors, without limit as to amount, should be paid out of Cochran's individual property to the exclusion of Cochran's creditors; and the provision is a fraud on Robinson & Parsons, under whom defendants claim as judgment creditor of Cochran. In Smith & Peters v. Howard *et al.* (20 How. Pr. 121), the court

says: "This fifth clause authorizes and directs both the share of one of the assignors in the joint property and also his individual property, without regard to its value or to the amount of his individual debts, and without regard to the value of the property or to the amount of the individual debts of his co-assignor, to be applied to the payment of the debts of his co-assignor, for which neither he nor his property was liable at law or in equity, equally with his own just debts. It, in short, authorizes the property of an insolvent debtor to be applied in part to the payment of the debts of another person, and for which neither he nor his property is in any wise bound before his own just debts are satisfied. Such a provision, in an instrument like the one under consideration, affords a conclusive presumption of a fraudulent intent on the part of the assignors." But the case before the court is still stronger. Cochran not only assigns his individual property to pay the individual debts of his co-assignor, Pollack, without limit or amount, but to pay the individual debts of Abbott, who makes no assignment, and the amount of whose individual debts is unknown, and that to the exclusion of Cochran's own individual judgment creditors. (1 Sandf. Ch. 348; 16 N. Y. 484; 24 *id.* 509; 3 Paige, 167, 517; 6 *id.* 19; 7 *id.* 26; 1 Story's Eq. Jur. 625.)

VIII. The assignment is void because it authorizes the assignees to compromise and compound all debts and claims due either member of the firms, or due by the firm, or either member of either firm, to themselves, the assignees, as preferred creditors—thereby placing it in their power to appropriate the whole assets, on real or fraudulent debts, of Abbott to either of said assignees. (9 Barb. 255; 4 Paige, 41; 11 Wend. 187, 203, 208.)

IX. The assignment is void because so admitted by plaintiff, and the court erred in excluding the admissions made of record. (1 Greenl. Ev. § 207; 3 Hill, 215; 1 Mees & W. 508; 42 Barb. 18; 5 Denio, 308; 6 Hill, 534; 8 Wend. 480.)

X. The third instruction asked by defendants and given by the court was correct. Defendants' title does relate back to the date of the attachment, March 2, 1860. This is five days subsequent to the recording of the assignment in the recorder's office

of St. Louis county, and six months prior to the deed of assignees under the assignment to plaintiff, and to deed of Cochran to plaintiff, made at the same time, leaving the decision of the court pending on the validity of the assignment alone. (23 Mo. 85, 92, 94, 115; 17 Pick. 106.)

XI. The sheriff's return was sufficient—*Id certum est quod certum reddi potest*. (Drake on Att. § 237, and authorities cited; 11 Pick. 341; 5 Me. 453; 2 N. H. 137; 9 Pick. 308; 33 Me. 141; 7 Johns. 217.)

XII. The proceedings in attachment and the judgment of the Common Pleas Court, under which defendants purchased, cannot be called in question in this collateral proceeding. (12 Mo. 514, 520, 238; 17 *id.* 71; 8 *id.* 264; 33 *id.* 28; 5 *id.* 235; 10 Pet. 472; 6 Gray, 520.)

XIII. The statute of *jeofails* cured all defects in the sheriff's return—the foundation of the special judgment of the Common Pleas Court. Rev. Code, 1855, p. 1255, § 19, provides: "When a verdict shall have been rendered in any cause, the judgment therein shall not be stayed, nor shall the judgment upon such verdict, or any judgment upon confession, *nihil dicit*, or upon failure to answer, nor any judgment upon a writ of inquiry of damages executed thereon, be reversed, impaired, or in any way affected by reason of the following imperfections, omissions, defects, matters, or things, or any of them, in the pleading process, proceedings, or record, namely, etc. \* \* \* Third, for any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not set to any return actually made by him, etc." The statute of 1845 did not cure such defects in cases of defaults; but the statute of 1835 did cure such defects, and the statute of 1855 is like that of 1835. (11 Mo. 359.)

XIV. The amendment to the sheriff's return, *nunc pro tunc*, was properly allowed by the court, and cannot be impeached in this collateral proceeding. (R. C. 1855, p. 1257, §§ 20, 21; p. 1466, § 11; p. 749, § 62.) In 19 Mo. 157, it was held that an amendment made by a sheriff, long after his term of office had expired, was proper. In 19 Mo. 408, the sheriff amended his return by inserting a proper description of land sold by him, and name

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of purchaser, five years after his term of office had expired. In 4 Ohio, 45, an amendment was allowed after fifteen years, by the administrator of an ex-sheriff, deceased. In 5 Johns. 356, an ex-sheriff was attached twelve years after his term of office had expired, and compelled to amend his return. (2 Sandf. Ch. 163.) A new return was permitted, *nunc pro tunc*, in Supreme Court. Deputy is still in office, as to process commenced by him before his principal's term expired. (6 Wend. 224; 20 *id.* 602; 3 Cow. 89, 95; 9 *id.* 203; Allen on Sh. 78, 202; Gwyne on Sh. 471; Crocker on Sh. § 40; 3 Monroe, 295; 6 Gray, 520; 14 Me. 263; 4 Hill, 71; 14 Pick. 31; 17 *id.* 106.)

XV. Although the judgment and proceedings may have been irregular and set aside, yet the title of defendant acquired under sale by sheriff cannot be impaired by any misfeasance or omission of the sheriff. He is an innocent purchaser, and if the wrongful act of the sheriff injures any party, his bondsmen are liable. (8 Wend. 9; 2 E. D. Smith, 474; 15 N. Y. 617; 3 Scam., Ill., 104; 1 McLean, 221; 12 Abb. Pr. 473; Gwyne on Sh. 351; 8 Mo. 264; 12 *id.* 514, 238; 10 Pet. 472.)

*Krum, Decker & Krum*, for respondent.

I. The assignment of all their real and personal property, wherever situated, by Cochran & Pollack, was a valid assignment. It was not void for uncertainty of description. The objection that there is no particular description of the lands granted cannot be maintained. The debtor gives, grants, sells, and conveys to the trustee all his lands, tenements, and hereditaments. The intention of the parties, therefore, that all the real estate should pass is manifest, and a particular description of the lands conveyed is not required. (Pingree v. Comstock, 18 Pick. 46.) Where a debtor assigned all of his estate, real, personal, and mixed, assignment held not invalid from uncertainty of description. It was a sufficient description of the property to give precise information of the nature and extent by reference and inquiry. (1 Sm. & M. 273-4.) A general assignment of all a man's property is not fraudulent *per se*. (Brashear v. West *et al.*, 7 Pet. 614.)

The assignment, although made in New York, yet passed the



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property in question as against the defendants. 1. They were not creditors resident in Missouri. (*Brown v. Knox et al.*, 6 Mo. 306; Bur. on Ass. 370-1.) The question of comity, therefore, which courts often rule in favor of parties resident within the jurisdiction of the forum, does not arise in this case, and the authorities cited do not apply. 2. The assignees complied with the local laws of Missouri. 3. The defendants do not stand in the relation of creditors. (*Jones et al. v. Lake*, 2 Wis. 210; *Norton v. Kearney et al.*, 10 Wis. 443; Bur. on Ass. 597.) The rule of comity in regard to assignments is limited in its terms to citizens of the State where the provisions of the assignment are sought to be enforced. As against citizens of other States, and especially as against citizens of the State where the assignment was made, the rule appears to uphold, without qualification, that an assignment valid by the laws of the State in which it is made is valid everywhere. (*Whipple v. Thayer*, 16 Pick. 25; *Bullock v. Taylor*, 16 Pick. 335; *Daniels v. Willard*, *id.* 36; 5 Mas. 174; *Richardson v. Leavitt*, 1 La. An. 430; *Atwood v. Protection Ins. Co.*, 14 Cow. 555; *Sanderson v. Bradford*, 10 N. H. 260; *U. S. v. Bank of U. S.*, 8 Robinson 262; 4 Zabriske, 162; *Blake v. Williams*, 6 Pick. 286, explanatory of *Ingraham v. Geyer*, 13 Mass. 146; Bur. on Ass. 369.) This levy is too vague and uncertain, and is not in conformity with the statute. (R. C. 1855, p. 244, § 22.)

II. The attempt to amend the sheriff's return in 1866 (six years after the plaintiff's rights had accrued, and five years after a sheriff's term of office had expired) was wholly abortive. The amendment does not assist the defendants' case, and cannot be made to operate to defeat the plaintiff's title. The plaintiff is shown to be a *bona fide* purchaser for value, without notice of the attachment sued out by Robinson & Parsons. The amendment indorsed on the attachment was not made by the late sheriff, nor by any one duly authorized to make it.

FAGG, Judge, delivered the opinion of the court.

The subject matter of controversy in the suit between these parties is certain real estate in the city of St. Louis, to which the

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plaintiff below claimed title as purchaser at a sale made by the assignees of Cochran & Pollack, and also by deed from Cochran himself.\* The defendants set up a title to the property under proceedings in attachment commenced subsequent to the execution and recording of the deed of assignment. The deed was executed and acknowledged before a proper officer, and in due form, in the city of New York, on the 18th day of February, 1860, and filed for record in the office of the recorder of land titles for St. Louis county, on the 25th day of the same month. The attaching creditors of Cochran, being also residents of the city and State of New York, instituted their suit in St. Louis on the 2d day of March following, upon a judgment obtained in that State. This suit was prosecuted to a judgment and sale of the property, upon which rests the title set up by defendants.

It appears from the bill of exceptions that there were two trials of this cause in the St. Louis Circuit Court. Although there is some confusion upon this point, sufficient appears to show that at the time of the first trial an application was made by the defendants for a continuance. The chief ground stated in the affidavit was that testimony had been discovered too late to be used in the trial to prove that "Cochran, one of the assignors under whom plaintiff claims title, was insolvent at the time he made the assignment, and that he made the same to hinder and delay creditors, and that the same is void." It is further stated in the bill of exceptions that, the application being held sufficient by the court, "the plaintiff elected to go into trial, and admitted the facts stated in the affidavit." At the second trial the defendants offered this admission in evidence, and it was excluded by the court. It was claimed, in the motion for a new trial, that the ruling of the court upon this point operated as a surprise to the parties, and they now insist that it was erroneous and constitutes good ground for a reversal of the judgment. It is plain that the statement of the counsel was not intended to go to the extent of admitting unconditionally the truth of the assertion made by the affiant in reference to the fraudulent intent of the party executing the deed.

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\* The deeds were dated September 1, 1860.

At most, it simply admitted the fact that the statements of the affidavit in reference to that matter were to be regarded as proved for the purposes of that trial. Any other construction would place the plaintiff in the attitude of having admitted away the chief part of the grounds upon which he evidently rested his right to recover. It was not in any sense an admission of record, and stood upon the same ground precisely as if the absent witness had himself been present and testified to the facts stated in the affidavit. The fact that the admission was preserved by a bill of exceptions does not alter the case at all. The testimony of the witness himself, if preserved in the same manner, could not have been read at the second trial. It was therefore not a surprise in a matter of fact, and constituted no ground for new trial. As no diligence was shown on the part of the defendants to procure the testimony of the witness, and there was no ground upon which the admission of plaintiff's counsel could be introduced in evidence, this point must be decided against the appellants.

That all the minor questions in the case may be first disposed of, we proceed to consider next the amendment of the sheriff's return to the writ of attachment. It contained no description of the property levied upon, but referred to another writ of prior date for the same, and was in other respects informal. This writ was issued and served on the 2d day of March, 1860, and by permission of the court was amended on the 20th day of March, 1866, long after the institution of this suit. The discretion of the Circuit Court as to matters of this kind is very large under the laws of this State. Although an amendment of the process should be allowed after judgment, and without notice, still it will not be questioned in the absence of anything tending to show an improper exercise of such discretion.

The effect of the amendment in this case was to give the defendants the benefit of a regular and valid service of the writ on the 2d day of March, 1860, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale. The deed of Cochran to the plaintiff bears date September 1, 1860. The lien, therefore, which was acquired by the levy of the attachment was prior in point of time, and must

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hold as against any subsequent conveyance of the property by Cochran himself. The court below committed no error in declaring that this conveyance was inoperative to pass any title to the land in question as against the purchaser under the attachment sale.

The plaintiff's whole case, then, must stand exclusively upon the validity of the assignment. The conveyance made by the assignees of Cochran & Pollack to the plaintiff was also executed on the 1st day of September, 1860. On the trial the court refused an instruction asked by the defendants declaring this deed as well as the assignment inoperative to pass any title to the plaintiff. They seem to have been executed, acknowledged, and recorded substantially in conformity with the requirements of the statutes of this State regulating the conveyance of real estate, and therefore present no difficulties on that score. The sole question remains as to whether the deed of assignment was fraudulent and void as to the attaching creditors of John Cochran. It purports upon its face to be a conveyance of all the property, real and personal, belonging to the firm, as well as to each of the members thereof, wherever situate, to the assignees named, in trust, for the uses and purposes declared. After providing for the payment of the costs and expenses of executing the trust, and the payment of wages due and owing to persons employed in their store in the city of New York, they direct the assignee "to pay off all the debts due and owing by the said firm of Cochran & Pollack, or the late firm of Abbott, Cochran & Pollack, or either of the members of said firms, to Cornelius Fiske." Directions were then given for the payment of certain specified creditors of both the firms mentioned, and lastly, "the surplus, if any, after the said debts and liabilities shall be paid in full, to restore and pay over to the said John Cochran, his heirs," etc.

The parties to be affected by the assignment were all citizens of the State of New York. Hence it is admitted that as to them, in the enforcement of its provisions in this State, the rule would hold without qualification, that if it is valid by the laws of the State of New York, it is so to be regarded here; so that if the question of its validity were to be decided without reference to

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any rights or liens acquired under the laws of this State by any of the parties thus interested, we should look no further than the laws and adjudications of the courts of that State upon the subject. (Bur. on Ass. 370.) The claim of the defendants in the court below rests upon a lien acquired by a regular proceeding under the laws of this State. The parties acquiring that lien were judgment creditors of John Cochran, and had a right to inquire into the validity of any transfer of his individual property. The defendants claiming under them are therefore clearly in a position to attack the *bona fides* of the assignment. It can make no difference whether this question is to be settled by the laws of this State or the laws of New York. It is apparent from the face of the deed that the individual property of Cochran was appropriated to the payment not alone of the debts of the firm, but the debts of his co-partner, Pollack, and also of Abbott. He was in no sense liable for the individual debts of these parties. It was a voluntary undertaking upon his part to pay the debts of other parties, and the appropriation of his own property to that purpose, to the manifest injury of his individual creditors. A conveyance or assignment by a debtor, especially of the whole or a greater part of his property, should not be employed as a means of preserving it for his own use or benefit, or of unduly protecting it from the remedies of his creditors.

It may be conceded for all the purposes of this case that the individual property of Cochran could be appropriated to the payment of the partnership creditors, to the exclusion of his personal creditors. He was individually liable for all the partnership debts, and the question of preference as between the two classes of creditors need not be considered.

The real matter of inquiry is, whether the individual debts due by his co-partner, or Abbott, a mere stranger, and without an interest either in the property of the partnership or either member of the firm, can be provided for in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. Such a conveyance cannot be upheld. As to the attaching creditors, it must be held as utterly fraudulent and void, and passed no title to the property in question.



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The other provisions of the assignment need not be considered.

The judgment of the Circuit Court will therefore be reversed and the cause remanded. The other judges concur.

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AARON CLAFLIN and CHARLES F. CLAFLIN, Appellants, v. SAMUEL ROSENBERG; SIMON STRAUSS, Interpleader.

1. *Practice — Trial — Instructions — Evidence tending to prove an issue always submitted to a jury.*—An instruction declaring that upon the evidence a claimant cannot recover, is only justified or warranted where there is a total and complete failure of evidence to uphold a verdict. Where there is any evidence tending to prove the issue, it must be submitted to the jury.
2. *Fraudulent Conveyances, statute concerning — Sale — Change of Possession, what constitutes.*—The tenth section of the act concerning fraudulent conveyances (Gen. Stat. 1865, p. 440) necessarily implies that, as against the vendor, the possession must be exclusively in the vendee. There must be a complete change of the dominion and control over the property sold, and some act which will operate as a divestiture of title and possession from the vendor, and a transference into the vendee. This necessarily excludes the idea of a joint or concurrent possession. It may not be essential or indispensable that the goods should be moved into a new or different house, but there must be some open, notorious, or visible act, clearly and unequivocally indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place; and, under the statute, the change must not be merely formal and temporary. But where the whole law has been complied with, there is nothing to prevent the employment of the vendor to render services in and about the property in the same manner as any other agent or employee.

*Appeal from St. Louis Circuit Court.*

This suit was commenced by attachment levied on a stock of boots and shoes in a store occupied by Samuel Rosenberg, defendant, near the corner of Seventh street and Franklin avenue, in the city of St. Louis, on the 22d of January, 1867. Simon Strauss, interpleader, claimed the goods by virtue of a bill of sale made on the 18th of December, 1866. Upon the trial of the interplea the testimony for Strauss showed that he was a milliner, doing business on Fourth street, in St. Louis; that he was brother-in-law of defendant; that he had loaned him considerable

sums of money, and paid certain bills on his account; that, in consideration of these debts, defendant gave him a bill of sale of his stock of goods, had the deed recorded, and turned over the store to interpleader, who, on the evening of the transfer, made an arrangement with defendant by which he employed him as his clerk, at a salary of \$70 per month, to sell the stock, receive the proceeds, and turn over to interpleader any balance which might remain after paying his own wages and expenses of the store, including the rent, which he was to pay to the landlord on behalf of interpleader. The testimony showed that, in pursuance of this arrangement, defendant continued to take charge and control of the store as before the date of the sale, except on one occasion, for two days, when, being sick, his brother, who was clerk of interpleader, supplied his place; and on other occasions, for an hour or so, when he was called away by business, and notified interpleader, whose clerk took his place in the meantime. Interpleader was at the store nearly every day, for an hour or so, before and after the sale, but more frequently afterward. He made his visits after the sale to look after the business; was there generally in the evening; never himself sold any goods, or interfered with defendant while selling them. This summary embraces substantially all the proof.

At the close of the testimony counsel for plaintiff asked the following among other instructions, which the court refused to give:

1. The jury are instructed that, upon the evidence, Simon Strauss, the interpleader, cannot recover.

2. To entitle the interpleader, Simon Strauss, to recover in this case, he must satisfy the jury by the evidence that the goods in question were sold and delivered to him; that he took possession of the same after the purchase; that he had exclusive possession as against said defendant, Rosenberg, and that the change of possession must have been an actual and visible change—such a change as to indicate to persons who had previously done business at the store of Rosenberg, aforesaid, that he no longer had possession of or controlled the goods attached.

3. Unless the jury are satisfied from the evidence that Simon

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Strauss had actual possession of the goods in question; that the change of possession was visible, continued, and exclusive, as against defendant, Rosenberg — such a change of possession as to indicate to purchasers at large that said defendant was no longer in control of said goods — they are instructed by the court that, as against creditors, the said sale is fraudulent and void, even although they believe from the evidence that said sale from defendant to said Strauss was in good faith and for a valuable consideration.

*T. A. & H. M. Post, and Samuel Knox, for appellants.*

I. The first instruction refused plaintiff by the court was based upon the tenth section of the statute concerning fraudulent conveyances (Gen. Stat. 1865, p. 440), and amounted to a declaration of law, that interpleader, by his testimony, failed to show an actual and continued change of possession of the goods in dispute after sale. Under the statute, in its present amended shape, the old question of intent is eliminated. There being no case showing change of possession, the transaction is fraud in law, however honest in intent.

In the case at bar the facts were few and plain, all developed by one party on his own behalf; and undisputed. The question, and the only question, was a bald, simple issue of law. Where the testimony as to given facts is diverse and conflicting, the case goes to the jury. But where the facts are clear and uncontradicted, the issue is for the court, however varied and complex such facts may be in their legal bearing. One undisputed fact may show possession in the vendor; another fact, equally unquestioned, may, when taken alone, show possession in the vendee. The testimony, nevertheless, like an agreed case, is one for the court. What the facts are must be settled by the jury. What the facts, when determined, amount to in the eye of the law, must be determined by the court. (Vance v. Boynton, 8 Cal. 554; Mylne v. Henry, 40 Penn. St. 352; 5 Watts, 483; 9 Johns. 342; 5 Serg. & R. 275; 10 *id.* 84.) The case of Stephenson v. Clark, 20 Verm. 624, which seems to make most strongly against this proposition, is expressly qualified by the same judge (Redfield) in

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the subsequent decision of *Burrows v. Stebbins*, 26 Verm. 659, which sustains in full the position of plaintiff.

The facts in evidence clearly failed to show that change of possession required by the statute. The language of the law is in itself plain, and its meaning is settled beyond dispute by a current of legal decisions, from the time of Elizabeth. As between the parties, constructive, fictitious, or symbolical delivery may be sufficient. As to outside creditors, fictions and badges of title are unavailing. There must be "a change of dominion and control over the property." (*Harvey v. St. Louis Butchers*, 39 Mo. 217.) "The principle which underlies all the cases is, that there must be an actual separation of the property from the former owner at the time of the sale, or within a reasonable time afterward, according to the nature of the property delivered." (*Barr v. Reitz*, 53 Penn. St. 258.) It is contended that when the vendor is acting as clerk of the vendee, the possession of the agent is the possession of the principal under whom he holds. But here the contest arises between vendor and vendee. Under the statute the one must hold as against, and not under, the other. Can it be maintained that while the vendor continues to exercise the charge, custody, and control, nevertheless the possession has passed out of him into the vendee? The only case in which symbolical or constructive change of possession will satisfy the statute is in cases where the property is inaccessible or immovable, or too ponderous or bulky to be transported. *Lex non coget ad impossibilia*. "An actual change of possession, so far as the thing sold is susceptible of it, is absolutely necessary to the validity of the sale, as to creditors and subsequent purchasers." (*Walter v. Cralle*, 8 B. Monroe, 11, 12; *Chase v. Ralston*, 30 Penn. St. 541; *Story on Sales*, §§ 304, 392; 2 Kent's Com. § 500; 29 Cal. 472-3; 8 Cal. 80, 554; 20 Cal. 323; 15 Cal. 503.) That the statute contemplates, as far as possible, a transfer of the goods, is evident from its language. There must be a delivery, "regard being had for the situation of the property." If it be inaccessible or immovable, of course there can be no transfer.

In this view of the law, what proof did the case show of actual

change of possession? No case ever was tried where absolute, unchanging continuity of possession could be established. The line of distinction must be drawn somewhere; and certain facts being given beyond dispute, the court is bound to face them squarely, and say whether they constitute a *bona fide* change of possession, or only unimportant and frivolous exceptional circumstances not affecting the fact.

2. The statute requires that the change of possession shall be continuous. (9 Cal. 271; 15 Cal. 506; 29 Cal. 472.) Interpleader's clerk took defendant's place, at the longest time, for two days. Was such a change in the eye of the statute continuous?

3. The change of possession must be open and notorious, so as to show the world at large that the property had changed hands. (19 Cal. 329; 15 Cal. 506; 10 N. H. 240; 8 Verm. 356.) Was there any evidence tending to show such notice to the world at large of the claims of the new owner?

It was the broad design of the statute, from political considerations, to separate the possession of the property from the vendor after sale absolutely, and regardless of ownership or notice of the ownership. It cuts deeper than fraud in fact and intent. It strikes a blow at the root of fraud by preventing the temptation to commit it. (5 Serg. & R. 281; 8 Cal. 83; 1 Smith's Lead. Cas. 48; 9 Johns. 343.)

The fact that plaintiff was notified of the transfer of the goods will not avail interpleader. An actual and continuous change of possession implying acts of general notoriety and publicity, such as to give knowledge to the community at large of the change of title, and, where the property is capable of it, an entire change of control, must follow the bill of sale in order to render it valid, just as much as a record thereof must accompany a chattel mortgage in order to make it good against purchasers. In the latter case personal notice of an unrecorded mortgage avails nothing. (Bryson v. Hardin, 18 Mo. 15.) Neither does notice to a creditor of change of possession, where there is no actual and continued change of possession, avail anything to render valid the bill of sale of goods. (Walter v. Crouch, 8 B. Monroe, 12; Roberts



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on Fraud. Cont. 16; Cowper, 711-12; Mason v. Baker, 1 A. K. Marsh. § 210; 40 Penn. St. 352.)

II. The second and third instructions should have been given. They declare that the possession of the vendee as against the vendor must be exclusive. These instructions strike directly at the case at bar, upon the theory of the facts set up by counsel for interpleader. Upon that theory both vendor and vendee were in possession after the sale—the vendor, as agent; the vendee, by virtue of ownership and occasional visits. This joint possession, the instructions refused declare, avoids the sale. That this instruction contains good law is clear from the authorities. (Chit. on Cont. 414; 1 Campb. 333-4; 7 Taunt. 149; 24 Texas, 624; 8 *id.* 33; 10 Serg. & R. 419; 17 Verm. 271; 3 *id.* 442; 19 *id.* 609; 16 *id.* 435; 29 Cal. 466.) The case of *Godchaux v. Milford*, 26 Cal. 316, is much relied upon by respondent, particularly the action of the court in overruling the following instruction: "If the jury find upon the evidence that Kraft was hired by the plaintiff, and remained in possession of the goods he (Kraft) had sold to him, as such hired man, the sale was void by the statute of frauds," etc. This instruction was overruled on this ground: In the language of the court, "it makes the bare employment of the vendor by the vendee in a subordinate capacity, regardless of the fact whether such subordinate capacity is open and notorious or not, the ultimate fact by which the statute determines the question of fraud." (*Id.* 325.) "If it be apparent to all the world" \* \* "that he, Kraft, had ceased to be the principal in charge and management of the concern, and became only a subordinate or clerk, the reason of the rule announced by the statute is satisfied." (*Id.* 325.) The instruction upon which that case hinged is totally different from the one now before the court. In the former case the vendee might have exclusive possession by reason of being in charge and custody of the property, and yet employ the vendor as clerk in a subordinate capacity. To quote the language of this case: "A hired clerk or salesman is no more in possession of the goods of his employer than a hired laborer is in possession of the farm on which he is employed to work." (*Id.* 325.) And why?

Because, notwithstanding his employment, it "may be apparent to the world that he has ceased to be principal in charge." All that the instruction refused demands is that the vendee, as against the vendor, shall have exclusive possession. If the vendor not only continues to take charge of the goods as clerk of the vendee, but to perform all the acts of ownership, who will conclude that the vendee has exclusive possession? As explaining the cases cited, *vide* Wood v. Bugby, 29 Cal. 466.

*Stewart & Wieting*, for respondents.

I. Plaintiffs admit the *bona fides* of the transaction, and charge no fraud in fact, but simply a technical fraud in law. The policy of the statute is to guard and protect the public against sales which are fraudulent in fact. (Hall v. Parsons, 15 Verm. 364.)

II. The instruction offered by plaintiffs at the close of interpleader's case was properly refused by the court:

1. There was testimony offered by interpleader tending to show an actual and continued change of possession of the property after the sale, which the court could not take from the consideration of the jury. (Chambers v. McGiveron, 33 Mo. 201; McKown v. Craig, 39 Mo. 156.)

2. What is a sufficient change of possession of property to protect it from attachment by the creditors of the vendor is always a matter of fact for the jury, where there is any testimony tending to show such change of possession. (Hall v. Parsons, 15 Verm. 364, 17 Verm. 277; Stephenson v. Clark, 20 Verm. 624-7.)

3. Although our statute makes the want of an actual and continued change of possession within a reasonable time after a sale conclusive evidence of fraud, it introduces no new rule touching what shall constitute such a change of possession. (Godchaux v. Milford, 26 Cal. 316.)

III. Instructions 2 and 3, offered by plaintiffs, could not have been given. The only proposition of law they contain, not found in the instructions already given for plaintiffs, is not sound. These instructions declare the law to be that interpleader's possession must have been exclusive as to Rosenberg, or the sale was fraudulent and void. The statute only requires actual and con-

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tinued possession. (Gen. Stat. 1865, p. 440, § 10.) This law was enacted by the legislature after the long series of decisions from Twynne's case, in 2 Coke, 80, down, involving every possible phase which the case could assume, especially the questions of actual and continued change and joint or concurrent possession, and adopts the strict rule established by the courts of some of the States requiring an actual and continued change of possession, but goes no further, leaving the question of joint or concurrent possession precisely as it was before the law was made — only a badge of fraud to be explained. (Chit. on Cont. 5 Am. ed. 412a-414; 24 Texas, 624; 26 Cal. 325; Stanley v. Robbins, 36 Verm. 423-5; Latimer v. Botson, 4 Barn. & Cres. 652; Martindale v. Booth, 3 Barn. & Ald. 498; Leonard v. Baker, 1 Mawle & Sel. 251.) Had the law-makers intended this to be an essential ingredient of a sale of personalty, the use of one word would have clearly and unequivocally expressed their meaning, and they could scarcely have omitted it when this law was under revision — *expressio unius est exclusio alterius*.

IV. Assuming, however, for the sake of argument, that the law is to be thus tortiously interpreted to mean what it does not say directly or by implication, still these instructions must have been refused. They ask the jury to find a conclusion of law, and not the facts constituting it. What is exclusive possession is purely a conclusion of law to be declared by the court; but what facts tending to show such possession are established by the evidence, the jury must decide. (Allen v. Edgerton, 3 Verm. 442-4; Farnsworth v. Shephard, 6 Verm. 621; Lyndon v. Belden, 14 Verm. 423; Hall v. Parsons, 17 Verm. 277.) Again, there was absolutely no testimony tending to show a joint or concurrent possession of vendor and vendee in this case. The fact that the vendor is employed by the vendee after the sale, to sell the goods, will not disturb the rights of the purchaser. "The hired clerk or salesman is no more in the possession of the goods of his employer than the hired laborer is in possession of the farm on which he is employed at work." (Stevens v. Irwin 15 Cal. 506, overruling 4 Cal. 128, 8 Cal. 80, 9 Cal. 972; Godchaux v. Milford, 26 Cal. 316; Ford v. Chambers, 28 Cal. 13; Brown v. Riley, 22

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Ill. 45; Warner v. Carlton, 22 Ill. 424; Neece v. Haley, 23 Ill. 416; Hall v. Wheeler, 13 Ind. 371-2; Wilson v. Hooper, 12 Verm. 653; Stephenson v. Clark, 20 Verm. 624-7; Stanley v. Robbins, 36 Verm. 423.) To constitute joint or concurrent possession it must be of the same description as that of a joint owner in using, occupying, and disposing of the property. (Allen v. Edgerton, 3 Verm. 442; Hall v. Parsons, 15 Verm. 358, 17 Verm. 277.)

V. Plaintiffs had actual notice of this sale, which they admit to have been for a valuable consideration, and of vendee's possession, and they are deceived or mislead by nothing save their own judgment—an error this court will not remedy. They are bound to see what others can see, and judge and act upon it with that prudence required of men in business affairs. (Stephenson v. Clark, 20 Verm. 624-7; Stanley v. Robbins, 36 Verm. 423.)

VI. The instructions given for plaintiffs put the question of change of possession fully and fairly before the jury, and unequivocally declare the law to be as laid down in the statutes; and the instructions given for both plaintiffs and interpleader, as a whole, contain a correct exposition of the law of the case, and present it clearly and explicitly to the jury.

VII. This court will not review the judgment of a court below refusing a new trial on the ground that the evidence does not support the verdict. Some part of the testimony was conflicting, and it is impossible for this court to say what the jury should believe. There is always testimony elicited during the course of a trial which has weight with a jury that a bill of exceptions cannot faithfully preserve. (State v. Anderson, 19 Mo. 241; Blumenthal v. Torini, 40 Mo. 159-60; Weber v. Degenhardt, 34 Mo. 458.)

WAGNER, Judge, delivered the opinion of the court.

This case was well argued, and the question is important, as it requires a definite construction of the tenth section of the act concerning fraudulent conveyances. (Gen. Stat. chap. 107, p. 440.) The subject of sales of goods and chattels without delivery has given rise to more protracted discussion and more contradictory

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decisions than any other matter in the whole range of the law. The construction given to the English statute of frauds in an early day was that the retention of personal property by the vendor, after sale amounted to fraud *per se*; that it was conclusive, and could not be rebutted by proofs of honesty and fairness in the transaction. The leading cases supporting this rigid and stringent rule are Twynne's case (2 Coke, 80) and Edwards v. Harbin (2 T. R. 587) in England, and they were followed and received the sanction of the United States Supreme Court in Hamilton v. Russell (1 Cranch, 97), and many of the States have adopted the same doctrine. In other States a more liberal view has been taken, and it is held that the retaining of the property after sale is only evidence of fraud, susceptible of being explained, and should be passed upon as a question of fact by the jury. In the early history of this State, the court adhered to the law as settled in Twynne's case and adopted in the national tribunal. (Rocheblave v. Potter, 1 Mo. 561; Foster v. Wallace, 2 Mo. 231; Sibley v. Hood, 3 Mo. 290; King v. Bailey, 6 Mo. 576.) But the cases holding this view of the law were all shaken or overruled in Shepherd v. Trigg (7 Mo. 151), where, for the first time, it was adjudged that in all cases the purchaser might show why he left the vendor in possession of the property, and that such possession was in good faith. In this conflict of judicial opinion the legislature interposed, and settled the law by statutory enactment, as declared in Shepherd v. Trigg. Several decisions were rendered by this court giving the statute an interpretation and legal exposition, and it was supposed that the vexed question was conclusively settled and put at rest, till the revisers, in 1865, inserted the tenth section, which unsettled the law, as it had existed for more than twenty years, and practically restored the ancient rule.

The objections complained of by the appellants consist in the refusal of the court to give certain instructions prayed for. The first instruction was, we think, rightfully refused. It declared that, upon the evidence, the interpleader could not recover. It is unnecessary to repeat that such an instruction is only justified or warranted where there is a total and complete failure of evidence to uphold a verdict; but where there is any evidence tending to



prove the issue, it must be submitted to the jury. There was some evidence in the present case, and the court very properly refused to withdraw it from the consideration of the jury.

The last instruction asked was bad, because there was no evidence to sustain it. The third and fourth instructions, however, are the ones principally relied on, and they may conveniently be considered together, as they contain substantially the same proposition. They assert, in effect, that the jury must be satisfied from the evidence that the interpleader took actual possession of the goods in question, that the change of possession was visible and continuous and exclusive as against Rosenberg, his vendor, and such as to indicate to purchasers at large that Rosenberg no longer had possession or control of the goods, else they should find for the appellants. The statute declares that "every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by actual and continued change of the possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith."

The main objection urged against the instructions is that they require the possession to be exclusively in the vendee, as against the vendor, and the court seems to have refused them principally upon that ground.

In *Wardall v. Smith* (1 Campb. 333), Lord Ellenborough, in speaking on this subject, said: "To defeat the execution there must have been a *bona fide* substantial change of possession. It is mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable; there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors." Although the statute does not use the word *exclusive*, it necessarily implies it, and it is obviously essential to carry out its plain intention.

The vendee must take the actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the

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community or those who are accustomed to deal with the party that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks and *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property.

There must be a complete change of the dominion and control over the property, and some act which will operate as a divestiture of title and possession from the vendor, and a transference into the vendee. This necessarily excludes the idea of a joint or concurrent possession. It may not be essential or indispensable that the goods should be moved into a new or different house, but there must be some open, notorious, or visible act, clearly and unequivocally indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place. The statute provides that the change shall be actual and continued; it must, therefore, be neither formal nor temporary; but where the whole law has been complied with, we see nothing to prevent the employment of the vendor to render services in and about the property, in the same manner as any other agent or employee.

The instructions placed the law correctly before the jury, and should have been given; and, for the refusal to give the same, the judgment will be reversed and the cause remanded. The other judges concur.

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THE AMERICAN NATIONAL BANK OF NEW YORK, Plaintiff in Error, v. JAMES H. BANGS and JOHN DEADY, Defendants in Error.

1. *Promissory Note—Place of Payment—Alterations.*—Where words designating place of payment on a promissory note are not incorporated in the body of the contract itself, nor in any manner annexed to the instrument by the maker for the purpose of fixing a place of payment, they are to be taken as a mere memorandum, and therefore immaterial. In a contest between holder

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and indorser, such an addition or memorandum, without the knowledge and consent of the latter, has been held sufficient to discharge him. As to the maker, the rule of law goes to the extent that he is generally and universally liable, and demand at a place designated in the note is not a condition precedent of payment.

*Error to St. Louis Circuit Court.*

This was an action to recover on a negotiable promissory note, alleged to have been made by defendants to the firm of Fritsch & Simonton, and by them indorsed to the plaintiff. The note was filed with the petition, and is in these words:

“\$1,000.

ST. LOUIS, *October 10, 1866.*

“Three months after date, we promise to pay to the order of Fritsch & Simonton, New York, one thousand dollars, for value received, negotiable and payable without defalcation or discount. Due at Goodyear, Bros. & Durand’s, New York, Jan. 10–13.

“BANGS & DEADY.”

(Indorsed) “Fritsch & Simonton.”

*A. H. Bereman*, for plaintiff in error.

I. The addition to the body of the note of a place of payment is not material, because defendants are liable universally—everywhere. (*Walcott v. Van Santvoord*, 17 Johns. 248.) Such authorities make the alteration material only in case of indorsers, who have a right to insist upon the note being presented at the proper place for payment. But plaintiff claims there was no alteration; that the placing the words as proven does not amount to an alteration, but is only a memorandum for the holders as to where the indorsers may be found, or other memorandum or abbreviation as to when it fell due, “Jan. 10–13.” There is not a case in point, in England or America, in which it is not held that such alleged alteration is no alteration. (*Exon v. Russell*, 4 M. & S. 505; *Williams v. Waring*, 10 Barn. & Cres. 2; *Story on Prom. Notes*, 56; 2 Pars. Notes and Bills, 548; *Cunard v. Tozer*, 2 Kerr, 367; *Smith’s Lead. Cas.* 1172, vol. 1, part 2, notes to case of *Master v. Miller*.) The case of *The Bank of America v. Woodworth*, 19 Johns. 391, quoted for defendant,

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was a suit between a holder and an indorser. Kane was the maker; after the note was indorsed, Kane wrote the memorandum, and actually signed his name to it, as well as to the note, and thus actually made a new contract, and actually made the note payable at a particular place, and so the note was actually altered. The bank presented the note for payment at the place designated in the signed memorandum, and did not make a personal demand on the maker. The indorser was released simply on the ground that when he indorsed the note his contract was that he was to pay in case of due demand at maturity, refusal and notice, etc. Notwithstanding the actual alteration, if personal demand had been made of the maker, at whatever place, is there any doubt what would have been the holding of the court? The case is not in point. The case of *Nazro et al. v. Fuller et al.*, 24 Wend. 374, is subsequent to that of the Bank of America, and quotes the older case as authority, but it is not evident that this question was presented. If it were, the judgment is based on the ground that the court below should have submitted the question to the jury as to whether it was a marginal note or was intended to be an alteration. In the cases of *Nazro v. Fuller*, and *Southwark Bank v. Gross*, 35 Penn. 80, there was an alteration, the words being added to the body of the note. The court will observe that every authority quoted in opposition is based upon some rule affecting acceptances of bills of exchange.

*A. M. Gardner*, for defendants in error.

I. The alteration of a note, without the consent of the parties, in any material part, as in the date, sum, time when or place where payable, renders the note wholly invalid as against any party not consenting thereto, although it be in the hands of an innocent holder. (*Chitty on Bills*, 182.) It was contended by the plaintiff at the trial that the added words were not a part of the note, but simply a memorandum on the margin to indicate where and when the note should be paid. Unfortunately for this view of the case, the makers resided in St. Louis, the note was made in St. Louis, and, presumptively at least, payable in St. Louis. In fact, by the terms of the note, it would have been

payable in St. Louis, unless with the consent of the parties, and unless the place of payment had been therein named. It certainly was very material to the defendants to know whether their note was to be paid in New York or St. Louis—especially if the change made them liable to protest, and their mercantile credit liable to be injured or destroyed thereby, without a demand on them for payment or the means of knowing where their note could or would be presented for payment. The respondents insist that the law upon this point is well settled. (*Bank of America v. Woodworth*, 19 Johns. 315.) In that case it was held that the words “payable at the Bank of America,” written on the margin, were a material alteration of the contract and discharged the liability of the party without whose knowledge or consent it was made. Where, to a note already complete, a memorandum is added or words inserted varying the legal effect of its stipulations, the alteration is material. (2 Pars. on Bills and Notes, 545; *Smith’s Lead. Cas.* 819.) The making of a note payable at a particular place, where none was named at the time of its execution, vitiates it in the hands of the indorsee. (*Nazro v. Fuller*, 24 Wend. 374; *Southwark Bank v. Gross*, 35 Penn. 80; *Burchfeld v. Moore*, 3 Ellis & Blk. 682.)

II. Although the note might have been a perfect and complete contract without the “added words,” yet the plaintiffs saw fit to make the addition, and subsequently treated it as a material part of the note, and made their demand and protest in accordance therewith. The facts being undisputed, the defendants insist that, even if the “added words” might in themselves be immaterial, or might have been taken as a mere memorandum on the margin, yet the plaintiffs, having themselves construed and made them a material part of the note, to the great and serious injury of the defendants, ought not now to be permitted, by vague and general averments, to ignore the facts or escape the legal consequences of their own wrong-doing in the premises.

FAGG, Judge, delivered the opinion of the court.

This was an action by the holder of a promissory note against the defendants in error as the makers of the same. The answer



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denied the execution of the note, and averred a want of knowledge or information sufficient to form a belief as to whether the plaintiff in error was a corporation, or whether the note was assigned by the payees, and before maturity and for value. The judgment of the St. Louis Circuit Court at special term, in favor of the defendants, was affirmed on appeal to the general term, and is now brought here by writ of error.

There seems to have been no controversy at the trial, except as to the identity of the note sued upon. The defendants rested their whole case upon the fact that there had been a material alteration of the note after its execution. J. H. Bangs, one of the defendants, being introduced on the part of the plaintiff, testified that he had examined the note sued upon, and "that the signature thereto of 'Bangs & Dedy' was the genuine signature of said firm, made by said witness." On cross-examination, he stated further that "the words 'at Goodyear, Bros. & Durand's, New York, Jan. 10-13,' placed at the foot of said note, to the left of the signature, were written there after the making of the said note, and without the knowledge or consent of the defendants; that the note as it now reads is not the note of the defendants; that they never promised or agreed to pay the same at Goodyear, Bros. & Durand's, New York; that otherwise the note was as it was originally made, and was altered in no other respect."

The question, then, is whether these words attached to the foot of the instrument are to be taken as a part of it or only a private memorandum, which can in no way affect the liability of the makers. It will be found upon an examination of the authorities upon this question that where such words are not incorporated in the body of the contract itself, nor in any manner annexed to the instrument by the maker for the purpose of fixing a place of payment, they are to be taken as a mere memorandum, and therefore immaterial. (Story on Prom. Notes, § 49; *Exon v. Russell*, 4 M. & S. 505; *Williams v. Waring*, 10 Barn. & Cres. 2.) The same doctrine is fully recognized by the American courts in all the leading cases that have been examined. (19 Johns. 391; 24 Wend. 374.)

It should be kept in mind that this action is against the makers

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themselves. It was not declared upon as a note payable at the city of New York. There is no contest here as to a right to tender the amount at any designated place of payment, but simply as to the effect of the addition upon their general liability to pay. The principle is everywhere recognized that the maker is generally and universally liable, and a demand at the place is not a condition precedent of payment. (*Nazro v. Fuller*, 24 Wend. 374.) The memorandum in this case does not increase or vary in any respect the liability of the defendants, and therefore presents no obstacle to the recovery of the plaintiff. It is admitted that in cases where there was a contest between the holder and indorser, such an addition or memorandum, without the knowledge and consent of the latter, has been held sufficient to discharge him. But as to the makers themselves, the question is altogether different. This opinion has proceeded upon the idea that the words in question were simply a memorandum made at the bottom of the note after its execution, and not intended to be a part of the contract itself. Such appears to be the fact, so far as the case is presented here by the record, but we will not assume it to be so for the purpose of entering up judgment in this court. The case proved at the trial did not authorize the declaration of law made by the court that the plaintiff was not entitled to recover.

Its judgment will therefore be reversed and the cause remanded for further trial. The other judges concur.

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OLIVER JOYALL and BAPTISTE RIVIERE, Appellants, v. STEAM-  
BOAT GOLDFINCH, Respondent.

1. *Boats and Vessels — Lien.*—Decision in *Cavender v. Str. Fanny Barker*, 40 Mo. 235, affirmed.

*Appeal from St. Louis Circuit Court.*

This was an action to enforce a maritime lien against the steamer Goldfinch for goods and supplies furnished by the plaintiffs, at St. Louis, which was the home port of the vessel and the

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place of residence of her owners. The court below held that no lien attached, and gave judgment for defendant.

*Clark & Coonley*, for appellants.

The defense relied on in the court below was want of jurisdiction.

I. The character of the contract decides the jurisdiction. (3 T. R. 267, 269.)

II. Is the contract maritime? (*Davis v. Brigg*, Gilpin, 477 *et seq.*; *De Sovio v. Boit*, 2 Gallison, 475; *The Jerusalem*, *id.* 347-8; *The General Smith*, 4 Wheat. 443; *The Huntress*, Davies R. 93-111.)

III. As to the exclusive nature of the admiralty jurisdiction, *vide* *The Moses Taylor*, 4 Wall. 411; *The Ad. Hine v. Trevor*, *id.* 555.

*Lackland & Martin*, for respondent.

I. In this case it appears from the record that the supplies were furnished at St. Louis; that this was the home port of the vessel proceeded against, and that the owners of said vessel were residents of this county. The maritime law gives no lien, and the State jurisdiction to enforce a lien for such supplies is not ousted or excluded by the jurisdiction of the United States. (*Cavender v. Str. Fanny Barker*, 40 Mo. 235.)

HOLMES, Judge, delivered the opinion of the court.

This case is not distinguishable from the cases of *Cavender v. Str. Fanny Barker*, and *Boylan v. Str. Victory* (40 Mo. 235, 244), and must be governed by those decisions.

Judgment affirmed. The other judges concur.

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JOHN FRANKLIN, Appellant, v. THE ATLANTIC FIRE INSURANCE COMPANY, Respondent.

- \*1. *Fire Insurance Policy—Evidence.*—Where no written application is required as a condition for the issuing of a policy of fire insurance, and the policy contained a condition that "if the interest of the assured in the prop-

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erty be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy would be void," and it appeared that at the date of the policy the plaintiff assured owned only an undivided half-interest in the property insured, and that there were encumbrances upon it, neither of which facts was expressed in said policy: *held*, that it was competent for the assured, in case of loss, to prove that, before the policy was delivered or the premium paid, the plaintiff informed the agent of the company of the condition of the title and encumbrances.

2. *Insurance Policy — Estoppels.*— *Held*, also, that where the agent of a foreign insurance company, whose policies contained the above-mentioned conditions, before issuing the policy or receiving the premium, being duly notified by the assured that his interest in the property was not entire, unconditional, and sole, and that there were encumbrances upon the property, failed to duly express these facts in a policy prepared by himself, and delivered it to the assured, saying that "it made no difference; it was all right," or words to that effect, and received the premium, the act of the agent was such a waiver of the conditions named as would amount to an estoppel *in pais*.
3. *Foreign Insurance Companies — Agents.*— Foreign insurance companies are bound by the acts of their local agents, acting within the scope of their general authority, without any immediate knowledge of the transaction on the part of the company.

*Appeal from St. Louis Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Harding & Crane*, for appellant.

I. The court below erred in refusing to allow the plaintiff to introduce the evidence offered. This evidence was competent to show that, prior to the contract being entered into, the defendant had waived a compliance with the third condition of the policy,\* so that this condition never became a part of the contract. Such a waiver may be by parol or acts *in pais*. (*Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402, and authorities there cited; same case, 40 Barb. 292; *Goit v. National Protection Co.*, 25 Barb. 189; *Ripley v. Aetna Ins. Co.*, 29 Barb. 552; *Atlantic Ins. Co. v. Goodall*, 9 Foster—29 N. H.—182; *Hallock v. Insurance Co.*, 2 Duch. 268; *Boehen v. Williamsburgh Ins. Co.*, 35 N. Y. 131; *Bersche v. Globe Ins. Co.*, 31 Mo. 546.) It was the fault of

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\* Referred to in the opinion of the court.

the agent of the defendant that the proper statement was not made on the face of the policy, and the plaintiff should not be prejudiced by the omission. (*Rowly v. Empire Ins. Co.*, 36 N. Y. 550; *Post. v. Aetna Ins. Co.*, 43 Barb. 351.)

*Ladue & Birge*, for respondent.

I. The court properly rejected the evidence offered to show "that before the policy was delivered and premium paid, the company's agent was informed of the existence of encumbrances." This was merely an attempt to vary the written policy by parol evidence, by showing that the parties abandoned one of the conditions of the policy; in other words, that they made a different contract than the one in evidence before the court. (*Phil. on Ins.*, vol. 1, pp. 49, 50, 51, 81, vol. 2, p. 680; 14 Mass. 15; 1 Taunt. 115; 21 Conn. 19-36; 1 Hall, 452; 23 Mo. 80.)

II. The only occasion for admitting such evidence arises, if ever, in an equitable action brought to reform the policy for fraud or mistake in executing it. It is not competent evidence in a suit at law. (23 Mo. 80-5; 2 Cranch, 419; 17 Mo. 247, 257.)

III. Even if this evidence had been admitted, "that verbal notice was given to the agent of existing encumbrances," still the policy required that it should be "indorsed thereon," and this provision is a condition precedent, and would defeat recovery. (21 Mo. 97-104; 16 Pet. 512; 17 Mo. 247-257.)

IV. By the terms of defendant's policy, one of its agents evidently had no power to waive the conditions in its issued policies. The condition itself was notice to the plaintiff of the agent's inability to waive it. Moreover, this agent is charged in the pleadings with having conspired with the plaintiff to defraud his principal, the defendant in this case. Under such circumstances his admissions could not be admitted to bind his principal. (17 Mo. 247.)

HOLMES, Judge, delivered the opinion of the court.

The plaintiff sues upon a policy of insurance issued by the Atlantic Fire Insurance Company of Brooklyn, New York, through its agent at St. Louis. The insurance was upon household furniture, against loss by fire.



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It does not appear that any written application for insurance was required.

The policy contained a condition that, "if any person effecting insurance in this company shall make any misrepresentation or concealment touching the risk to be assured," the policy should be void; and also another, that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void."

The defendant offered evidence tending to prove that, at the date of the policy, the plaintiff owned only an undivided interest of one-half in the property insured, and that there were two encumbrances on the property by deeds of trust executed by the plaintiff's grantor.

In rebuttal, the plaintiff proposed to show that after the policy had been made out, but before it was delivered or the premium paid, the plaintiff had informed the agent of the company that he was only a part owner of the property, and that the same was encumbered as aforesaid, and that the agent then said "it would make no difference; it was all right," or words to that effect.

This evidence was excluded, and the plaintiff took a non-suit.

The only material question in the case is, whether this evidence was admissible.

By the general law of insurance, the interest of the assured in the property is not required to be specifically described in the policy. This matter was not in itself of the nature of a misrepresentation touching the risk to be assumed.

It did not regard the situation or character of the property. It became important only by virtue of the condition which required that, if the interest were any other than the entire, unconditional, and sole ownership, it should be so represented to the company and so expressed in the policy. The object of this clause was, doubtless, to protect the company against the danger of taking risks on the property insured for so large an amount in proportion to its value, or the value of the interest of the assured, as to

furnish a temptation to fraudulent conduct. This evidence would show that the fact was truly represented, and then there would be no misrepresentation in respect of that matter. It was further required that it should be so expressed in the written part of the policy; and this was not done. If it had been done it would have amounted to an express warranty; and it was provided that if it were not so done the policy should be void. Now, it was plainly the duty of the agent to have this thing done. It was his business to receive the application and draw up the policy in proper form. He was placed by the company in the office of the agency at St. Louis, with full authority to receive applications and issue policies in the name of the company; and the defendant must be held bound by all his acts and doings within the scope of his authority.

The actual state of the case, then, is that the agent receives a verbal application for insurance, and, before the policy takes effect by delivery, the interest of the assured in the property is truly stated to his satisfaction, by which his attention is called to the circumstance that the specific character and extent of the interest ought to be expressed in the written instrument, and he answers "it will make no difference; it is all right," receives the premium and delivers the policy. The policy is accepted and the premium is paid on the faith of this assurance. The party insured goes away relying upon its validity to protect him against loss during the time specified. He acts upon a state of things represented to him by the agent to be sufficient, and it would work a fraud upon him if the company should now be allowed to avail itself of this defense. If no disclosure of the nature of his title and interest had been made, or if he had fraudulently concealed it and then accepted this policy, the misrepresentation being of a matter material to the risk which the company had intended to assume, it would have amounted to a clear breach of warranty. This would have been a fraud upon the company, and the policy would have been void. Upon the facts which the plaintiff proposed to prove, such would not be the case, but the fraud would lie with the other party, and we think the matter would come within the principle of the authorities on the doctrine of

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estoppel *in pais*. It would amount to a waiver of the condition requiring this matter to be inserted in the policy prior to the completion of the contract.

This principle was applied in *Horwitz v. The Equitable Ins. Co.*, 40 Mo. 557, upon a similar state of facts. In that case, it is true, the action of the agent was directly made known to the officers of the company, who made no objection; but that only made the waiver and authority of the agent more clear. In this case the agent was acting within the scope of his general authority, and the company must be held equally bound by his action without any immediate knowledge of the transaction. They were responsible for his acts in the premises.

The same doctrine was applied in *Rowley v. The Empire Ins. Co.*, 36 N. Y. 550, in which an analogous state of things was presented. There was a policy containing a valid contract of insurance; the agent had surveyed the property for himself, and induced the applicant to sign a written application which he had drawn up and represented to be correct, but which was materially erroneous in reference to the position of the buildings insured; and the company was held to be estopped from showing a breach of warranty in respect of that matter. The agent had authority to take applications and issue policies, and the company was not allowed to set up the errors of its own agent to defeat the contract.

There is manifest justice in the application of the principle to a case like this. These foreign insurance companies may justly be held bound, to the fullest extent the law will allow, for the acts of their agents appointed to represent them in these agencies abroad. Parties dealing with them are induced to rely upon them as having competent authority for the transaction of the whole business which they undertake. If the agent abuses the confidence reposed in him by his employers, they must look to the agent. The law will protect the companies against frauds, misrepresentations, and breaches of warranty, but it will not lend its aid to support defenses founded upon their own errors or omissions, when they have received the premium, delivered a complete and valid policy, and lain by without objection until a loss

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has happened; it will not help them to accomplish a fraud upon the assured. For these reasons we think the evidence should have been admitted. Some points were made, also, upon the right of the plaintiff to sue upon the policy, but we have not found any other error in the action of the court below.

Judgment reversed and the cause remanded. The other judges concur.

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JOSEPH WORTHINGTON, Respondent, v. EDWARD WHITE, Appellant.

1. *Practice—Trial—Partnership—Dismissal of Suit—Construction of Statute.*

Where a receiver in a partnership suit made a report showing on its face *prima facie* evidence of a full settlement of all matters in controversy between the parties, it was proper for plaintiff to dismiss his suit without proceeding further, under Gen. Stat. 1865, p. 662, § 47. Had it been manifest that the rights and interests of defendant would be prejudiced thereby, a dismissal of the case might have been erroneous, notwithstanding the above provision.

*Appeal from St. Louis Circuit Court.*

*P. Garesche & Mead*, and *Babcock & Neil*, for appellant.

I. The cause should not have been dismissed, both parties concurring in the prayer that the court adjust the accounts. A plaintiff cannot dismiss a bill when, by a decree in the cause, the defendant has as direct an interest in the continuance of the suit as the plaintiff, and may ultimately be as essentially benefited by it. (*Hall v. McPherson*, 3 Bland. Ch. R. 534; *Holt v. Bank of Augusta*, 9 Geo. 552.) The plaintiff is allowed to dismiss his bill on the presumption that it leaves the defendant in the same position in which he would have stood if the suit had not been instituted, but that is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff. (*Casper v. Lewis*, 2 Phil. 178.)

II. The dismissal of the cause did not bar defendant's right to except to the commissioner's report, nor prevent the court from entertaining the motion. (*Edw. on Rec. 20*; *McCoshen v. Brady*,

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1 Barb. Ch. R. 329; 2 Dan. Ch. Pr. 1623; 1 Barb. Ch. Pr. 677.) A receiver cannot account to the parties, and must do so to the court. (39 Barb. Ch. R. 172.) After dismissal of a suit, receivership will be continued, if to the benefit of the defendant. (Whiteside v. Pendergast, 2 Barb. Ch. R. 471; Mutual Safety Ins. Co. v. Roberts, 4 Sandf. Ch. R. 592.) Though a cause be dismissed from the calendar, motions may still be made. (Pitt v. Bonner 5 Sim. 577.)

*Ewing & Holliday*, for respondent.

I. The plaintiff had a right to dismiss his suit, and there was no error in refusing to set aside the order of dismissal. (Gen. Stat. 1865, p. 662, § 47; Everett v. Taylor, 32 Mo. 390; Nordmanser v. Hitchcock, 40 Mo. 178, 182-3.) In chancery practice it is always a matter of course to permit a complainant to dismiss his bill, at any time before an interlocutory or final decree has been made, upon payment of costs. (Cummins v. Burnett, 8 Paige Ch. R. 79, 81, and authorities there cited.) The jurisdiction of the court in the case had ceased by the acts of the parties themselves. The submission of the cause by the parties to arbitration, of itself operates as a discontinuance of the case where there is no agreement that judgment shall be entered on the award. (Larkins v. Robbins, 2 Wend. 505; Ex parte Wright, 6 Cow. 399; Camp. v. Root, 18 Johns. 22; Green v. Patchen, 13 Wend. 293; Jewell v. Blankenship, 10 Yerg. 439; 2 Hemple, 516.) The report of the receiver shows that the partnership affairs, the subject matter of the suit, had all been settled upon the basis agreed upon by the parties themselves; that the receiver paid off all the debts of the concern and took the receipts of all the creditors, and also received from them written authority to dismiss the suit; that the receiver had a settlement with plaintiff and defendant, turned over to them the goods and assets set apart belonging to each, and took from each receipts discharging him from all liabilities as receiver. So that whether the reference of the matter to other parties and their action upon it be viewed as an arbitration, or as the voluntary withdrawal of the controversy from the court and an accounting



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and settlement by the parties themselves, in either view defendant is estopped from objecting to the dismissal of the suit. (Wells v. Lain, 15 Wend. 99, 105, 108.)

FAGG, Judge, delivered the opinion of the court.

The parties to this suit, being partners in trade in the business of selling dry goods in the city of St. Louis, in the month of April, 1867, mutually agreed upon a dissolution of the copartnership, to take effect on the first day of August following. On the twelfth day of that month the respondent filed his petition in the St. Louis Circuit Court, alleging the inability of his copartner and himself to make a satisfactory settlement of their accounts, and the mental and physical incapacity of the former to attend to the business of winding up the affairs of the concern, and making an exhibit of the assets and liabilities of the firm. The principal ground of disagreement between the parties seems to have been a different construction given by each to the terms of the copartnership. The complaint alleges that the entries of the respective stock accounts upon the books of the firm were incorrect and showed an improper statement of credits to the appellant and debits against the respondent. The prayer of the bill is for an order restraining the defendant below from collecting the debts of the firm or in any way interfering with the business, the appointment of a receiver to take charge and dispose of the entire property of the partnership, and for an adjustment and settlement of their accounts. An injunction bond being executed and approved by the court, the restraining order was made at once, and one John Sylvester duly appointed receiver. The answer was filed on the nineteenth day of October following, and contained no denial of any material averment in the petition, except as to the statement of the respective stock accounts of the partners. It alleged that the general business of the store and the entries upon the partnership books were, for the most part, under the supervision and control of the petitioner, and that the accounts were correctly stated according to the true meaning of the agreement between the partners. It also asked for an account between the parties, for the purpose of ascertaining the value of their respective interests

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in the assets, according to the statement of the same made in the petition and admitted by the answer.

On the eighth day of November following, the receiver made a report of his proceedings and asked to be discharged from his office. The report sets out in full the terms of an agreement entered into by the parties to the suit on the day after his appointment as such receiver, by which all the matters in controversy between them were submitted to arbitrators, and a full and complete division made of all the assets.

It shows to the court the receipts and acquittances for all debts due by the firm and all expenses incurred in the settlement of the business; also, a receipt in full by each one of the partners for his share of the assets, and a discharge of the receiver from all liability as such. The record does not show that any action whatever was taken by the court in reference to the report. After it was filed, and on the same day of the term, the suit was dismissed on motion of the plaintiff, but against the consent of the defendant. A motion was afterward made by the defendant asking that the order of dismissal be set aside and the cause reinstated upon the docket, which was overruled by the court. Another motion was also made for an order on the receiver, requiring him to make another and more specific report of his receipts and expenditures, which was also overruled by the court. No exceptions were taken to the report, and the only reasons appearing upon the record for not dismissing the suit are to be found in the motion to set aside the order of dismissal and reinstate the cause. It is to be observed that this motion was made on the twenty-second of November, and upon notice given to the attorneys of the plaintiff after the suit was actually dismissed. It is manifest that the only question that can arise upon this statement of the case is the propriety of the order dismissing the plaintiff's bill. The language of the statute allowing a plaintiff to dismiss his suit at any time before a final submission of the same to the court or jury is without qualification or exception. (Gen. Stat. 1865, p. 662, § 47.)

It may be true that a strict construction of this section should not be allowed in a case where it is manifest that the rights and interests of the defendant would be prejudiced thereby.

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Morgner v. Kister et al.

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It is unnecessary to discuss that question, as it has no application to the case at bar. It is not pretended but that the defendant was amply protected from the commencement of the suit. The bond of the plaintiff upon which the injunction was granted, as well as that subsequently executed by the receiver, would seem to be sufficient to cover all damages that could have accrued to the defendant at any stage of the proceedings.

To say nothing about the well-established practice in chancery to permit the complainant to dismiss his bill, as a matter of course, at any time before an interlocutory or final decree, the report showed upon its face *prima facie* evidence of a full settlement of all matters in controversy between the parties. Upon every view of the case there seems to be no reason to sustain the objections urged against the action of the court below by the counsel for the appellant.

The property in this case being in the hands of an officer of the court for the benefit of both parties, he is subject at all times, until a final discharge, to such orders in reference thereto as may be necessary for the protection of the rights and interests of both. The sufficiency of the receiver's bond to protect them against any loss or injury done or suffered by him is not questioned, and we can therefore see no good reason for setting aside the order of dismissal and reinstating the cause upon the docket.

As to the right of the defendant to institute any further proceeding against the receiver, either by motion or an action upon his bond, we shall express no opinion. This point is not presented by the record here, and will not be considered.

With the concurrence of the other judges, the judgment of the Circuit Court will be affirmed.

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ALBIN MORGNER, Plaintiff in Error, v. HENRY KISTER and  
FRANCIS X. KREMER, Defendants in Error.

1. *Pleadings—Motion for New Trial—Supreme Court.*—The failure of a party appellant to file his motion for new trial or in arrest of judgment, thereby giving the Circuit Court no opportunity to correct its own errors, is fatal to an application for a review of the proceedings in this court.

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Hannibal & St. Joseph R.R. Co. v. Mahoney.

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*Error to St. Charles Circuit Court.*

*E. A. Lewis*, for plaintiff in error.

*H. C. Lackland*, for defendants in error.

FAGG, Judge, delivered the opinion of the court.

There are many defects in the steps taken to bring this cause here by writ of error. Passing over these, however, it is apparent from the record that there was no motion in the court below either for a new trial or in arrest of judgment. According to the former decisions of this court, an opportunity should have been given to the Circuit Court to correct its own errors; and a failure to do so is fatal to an application for a review of the proceedings here. (*Banks v. Lades*, 39 Mo. 406; *Bishop v. Ransom*, *id.* 416-17.)

Judgment affirmed. The other judges concur.

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HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant, v.  
LORENZO D. MAHONEY, Respondent.

1. *Practice—Circuit Court—Appeal—Errors on the face of the Record, how revised.*—Where the error complained of in an appeal from the Circuit Court is apparent on the face of the record, it may be revised without the saving of exceptions or the filing of a motion for new trial.
2. *Practice—Circuit Court—Jurisdiction of, when inquired into.*—The question whether the Circuit Court has jurisdiction of the cause may always be inquired into.
3. *Practice—Trespass—Action of, when brought—Construction of Statute.*—The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. Section 3, ch. 163, p. 653, Gen. Stat. 1865, does not apply to actions of that description, but contemplates those where the suit was in the nature of a proceeding *in rem* affecting the land itself.

*Appeal from Sixth District Court.*

Appellant commenced suit in the Circuit Court of Marion county to recover treble damages for certain alleged trespasses in cutting and carrying away timber from certain land situated in

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Lewis county, Mo. Respondent filed an answer denying that he wrongfully entered upon said land; denying the appellant's ownership thereof; and denying the cutting down of said timber. He then pleaded, in abatement of appellant's suit, the fact that the real estate described in appellant's petition was situated in the county of Lewis. Appellant demurred to that part of the answer pleaded in abatement, which demurrer the court overruled. Appellant then filed a motion to strike out the part of said answer described in said motion, which appears to have been also overruled. On the trial of the issue joined, the appellant offered evidence tending to prove the allegations in his petition. Defendant objected to the introduction of any evidence in support of the allegations in the petition, for the reason that it was admitted by the pleadings that the land on which the trespass was alleged to have been committed lay in the county of Lewis, and that the suit involved the title to said land, and hence that the court had no jurisdiction, which objection the court sustained, and refused to allow evidence to be adduced. Defendant then moved the court to dismiss the cause on the ground that it had no jurisdiction over it, as was shown by the pleadings. The court sustained defendant's motion, and thereupon dismissed the cause.

Appellant took an appeal to the Sixth District Court, which affirmed the judgment of the Circuit Court of Marion county. The appellant then appealed to this court.

*James Carr*, for appellant.

I. This action is one contemplated by the first section of chapter 163, p. 653, of the General Statutes of 1865, which confers jurisdiction upon the Circuit Court of Marion county, and not one contemplated by the third section of that chapter. This is strictly and purely an action *in personam*. It is for a certain sum of money, *eo nomine et numero*. It does not ask for any relief affecting the title to the realty. The first and third sections preserve the distinction between actions *in personam* and actions *in rem*. In the class of actions provided for in the first section, there must be, *ex necessitate rei*, a personal service of the summons. It is the residence of the one or the other within the county



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in which the suit is brought, and the service of the summons, whereby the court acquires the jurisdiction.

In the class of actions contemplated by the third section, the court may acquire jurisdiction by an order of publication, except in the case of an action in ejectment. It is true the law requires the defendant to be summoned, if he reside in the State. But the service of the summons upon him in any of the modes pointed out by the statute is not a *sine qua non* to the courts acquiring jurisdiction, as it is in the class of actions *in personam* provided for in the first section. The two sections evidently are based upon the palpable distinction between actions *in personam* and actions *in rem*. In this case the action is purely an action *in personam*. Still, the title is called in question from the nature of the defense. But while the title, from the nature of the defense set up, is called in question, it is not the primary object of the suit; and hence it cannot be said that it is a suit whereby the title is affected, within the purview of the third section. The suit involves the title in a collateral way. The primary object of the suit is not to affect the title. What is meant by the words of the third section, "whereby title may be affected?" It is evidently in those cases where the direct effect of the judgment of the court is to change the legal status of the title, as in the case of a judgment of foreclosure of a mortgage; of partition; for specific performance; to enforce a vendor's lien; to enforce a mechanic's lien; or of a suit to require a party claiming title to litigate or disclaim title, under sections 53-4 of chap. 166, pp. 662-3, of Gen. Stat. 1865; or a *quia timet* under the old equity practice; to remove a cloud upon the title; an information by the prosecuting attorney to declare land escheated to the State. In all these cases the suit would be such as to affect the title to the land; and under our system of recording it is eminently proper that the records of it should be in the county where the land is situated. (*Ulrici v. Papin*, 11 Mo. 48.)

This is a simple action for trespass to the realty. It is a personal action. How is the plaintiff to know, before the defendant files his answer, that the defendant will deny the plaintiff's title or call it in question in any way until after the answer is filed?

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The defendant may admit the title alleged and the trespass alleged in the plaintiff's petition; he may simply controvert the *quantum* of damages; and that not being a traversable allegation, he can controvert as well on an inquiry of damages as with an answer filed. Suppose, then, the plaintiff should institute the suit in the county where the land is situated, and send a summons to the county where the defendant resides, and he pleads in abatement that he and plaintiff both reside out of the county where the suit is instituted, would not the court be warranted in sustaining the plea?

II. An additional argument to demonstrate that a simple action of trespass to the realty is not required to be brought in the county where the land is situated, may be found in Gen. Stat. 1865, chap. 177, p. 698, § 4, prescribing the jurisdiction of justices of the peace. An action for trespass to realty may be maintained before a justice of the peace. But if the defendant calls the title in question in any way, the justice's jurisdiction in the suit instantly ceases. Justices of the peace are not supposed to possess the learning requisite to determine the many subtle questions which arise in the progress of a suit in which the title to land may be called in question; *a fortiori*, where the direct object of the suit is to obtain a judgment affecting the title so as to change the legal status of it.

III. But if the court be of opinion that the Circuit Court of Marion county had no jurisdiction, still it is a court of general jurisdiction; and having acquired jurisdiction by the service of the summons, and the respondent having submitted to the jurisdiction of the court by pleading in bar, he thereby waived his right to plead in abatement. (Phillips v. Bliss, 32 Mo. 427; Ulrici's Adm'r v. Papin, 11 Mo. 48.)

*Redd & McCabe*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

In the District Court the judgment was affirmed without any discussion of the merits of the question raised, simply on the ground that the plaintiff had failed to file any motion for a new

trial or in arrest of judgment in the Circuit Court. The error complained of is apparent on the face of the record; refers exclusively to the jurisdiction of the court, and may be revised without the saving of exceptions or the filing of a motion for a new trial.

The only question raised by the record is whether the Circuit Court had jurisdiction of the cause; and that may always be inquired into. The action was brought in the Circuit Court of Marion county against the defendant for trespass alleged to have been committed by him on land lying in Lewis county, claimed by the plaintiff. The answer denied the alleged trespass, denied that the plaintiff owned the land, but admitted that it was situated in Lewis county, and prayed that the case might be dismissed for want of jurisdiction. The Circuit Court dismissed the case accordingly.

The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. But the decision of the court was evidently predicated on the opinion that, by a direct provision of our statute, the suit could only be prosecuted and maintained in the county where the land was situated, after the ownership was denied.

By Gen. Stat. 1865, chap. 163, § 3, it is provided that "suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate or some part thereof is situated."

The point involved in this case has never been before this court or received a direct adjudication. Can this suit be said to affect the title to real estate within the meaning of the statute? Unquestionably the law contemplated an action where the real estate was the subject of the controversy, where the suit was in the nature of a proceeding *in rem* affecting the land itself. In ejectment, to try title or obtain possession, the real estate is the main matter in issue. In partition, in actions for the foreclosure of mortgages, or to enforce mechanics' or vendors' liens, in petitions for the admeasurement or assignment of dower, and various other cases that might be put, the land is the immediate and primary subject, and the title is clearly affected.

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In all such cases, where the title is to be affected, obviously suits concerning the same must be commenced and tried in the county where the land lies. But is the title in anywise affected in an action of trespass? The primary object in trespass is to recover damages, not to try title to real estate; and it matters not which side is successful, the title remains unaffected. The plaintiff cannot obtain judgment without showing title, where his ownership is denied; but his proof of title is collateral, and a mere incident of the real issue, his right to damages.

If the plaintiff shows title sufficient to enable him to maintain his cause of action, the judgment does not operate on the real estate or affect the title thereto. The proof of title only amounts to a link in the chain, among others, of the evidence by which he supports his issue and recovers a general judgment for the wrong done him by the defendant.

To come within the purview of the statute, it must be a case not merely where the title is drawn in question, but where the title is to be affected.

Entertaining these views, our conclusion is that the statute does not apply to a personal action of this description, and that the judgment should be reversed and the cause remanded. The other judges concur.

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OWEN MURRAY, Defendant in Error, v. EDWIN BOYNE, Plaintiff in Error.

.. *Criminal Law — Assault — Words of Provocation.* — Mere words, no matter how abusive they may be, cannot justify an assault.

*Error to Second District Court.*

This case originated in the Jefferson Circuit Court. Upon the trial, the following instructions asked by defendant were refused by the court:

1. The court instructs the jury that if they believe from the evidence that plaintiff, by any misconduct on his part, willfully

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brought on the fuss and went into the fight voluntarily, then he must take the consequence of his own misconduct.

2. If the jury believe from the evidence that plaintiff desired a fight, and resorted to abusive language toward Boyne in order to get him to assault plaintiff, then plaintiff should be held the aggressor.

3. That raising the fist in a threatening manner within striking distance is an assault; and if the jury believe from the evidence that plaintiff did so assault the defendant, then defendant had a right to repel force by force to prevent a reasonably apprehended danger; and that if defendant used no more force than was necessary to get rid of his antagonist, then they should find for defendant.

*J. L. Thomas*, for plaintiff in error.

*Abner Green*, for defendant in error.

FAGG, Judge, delivered the opinion of the court.

This was a simple action for damages resulting from assault and battery. The statement of the cause of action is made up of the facts out of which the whole amount of damages sustained by the plaintiff is alleged to have arisen. We find nothing objectionable in the petition either as to form or substance. The only remaining question is as to the declarations of law given and refused by the court.

The facts in the case are few and simple, and the instructions given by the court sufficiently apprised the jury of the proper issue presented by the pleadings, as well as what might be taken into consideration in estimating the damages. As to the first two instructions asked by the defendant and refused by the court, they were clearly improper upon the facts proved, and did not contain correct propositions of law. Mere words, no matter how abusive they may be, cannot justify an assault. The only statement in the whole case that could be relied upon as sufficient to sustain the third instruction was made by the defendant himself. It is that when he (defendant) struck plaintiff, the latter was raising his hand to strike him. This statement was wholly unsupported by



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the other witnesses in the cause, including those who testified on the part of the defense. It really amounted to nothing more than that, according to his recollection of the facts, both parties were in the act of striking about the same time. It was hardly sufficient to authorize an instruction as to what the law of the case was, in the event that the jury should find that plaintiff made the first assault. However, it seems that in the instructions given by the court upon its own motion, the defendant got the full benefit of such a declaration.

The whole case presents one of those familiar occurrences where there is no difficulty about applying the principles of law that govern them, and there is no reason for disturbing the verdict of the jury. The judgment of the District Court, affirming the judgment of the Jefferson Circuit Court, is therefore affirmed. The other judges concur.

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CHARLES M. THURSTON *et al.*, Plaintiffs in Error, v. ISAAC ROSENFELD, JR., *et al.*, Defendants in Error.

1. *Assignment—Non-resident Creditors—Conflict of Laws.*—Comity does not require a court to enforce a contract valid according to the laws of the place where it is made, if such enforcement would result to the manifest injury or detriment of the citizens of the country where the property is situated or the claim attempted to be enforced. But where all parties to a suit are residents of another State, and defendants had made an assignment of their property, in accordance with the law of that State, for the benefit of their creditors, and an assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of and residing in that State, could not secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvent in this State.

*Error to St. Louis Circuit Court.*

*Sharp & Broadhead*, for plaintiffs in error.

I. The real estate owned by Rosenfield, and situate in Missouri, could only be conveyed according to the laws of Missouri. The contract, it is true, was made in New York, but the property is in Missouri and under its peculiar and exclusive jurisdiction.

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Although, as a general proposition, a contract valid by the law of the place where it is made is valid everywhere, yet this is subject to many exceptions. 1. If the contract concern real property, the American will is firmly established that the *lex rei sitæ*, and not that of the place of the contract, is to prevail. (Story Confl. Laws, §§ 363-5; *id.* 424, 431.) The *lex rei sitæ* is to prevail in relation to all dispositions of immovable property. (Story Confl. Laws, §§ 445, 423; *United States v. Jonah Crosby*, 7 Cranch, 115; *Bur. on Ass.* 360.) 2. A contract even in regard to personal property, when it contravenes the law of the place where it happens to be situate, or when it is repugnant to the policy of the State, is invalid. (1 Green. 326; 2 Mas. 157; 12 Wheat. 259; *Frazier v. Fredericks*, 4 Zabriskie, 166; Story Confl. Laws, 244; 5 La. 295; *Zipeey et al. v. Thompson et al.*, 1 Gray, Mass., 245; *Smith v. Union Bank of Georgetown*, 5 Pet. 518.) The case in 1 Gray, 245, was the case of an assignment made in New York giving preferences of property in Massachusetts, where by law such preferences were invalid. The court, in delivering its opinion, says: "The law of New York *proprio vigore* cannot obtain here. It derives its effect only from the will of comity, and that will refuses to give force to the laws of other States which directly conflict with the policy of our own. No comity can require us to give force to an assignment made in another State which is not only against our well-settled policy, but against our direct legislation." Judge Story says: "In regard to voluntary assignments with preferences, they must, as to their validity and operation, be governed by the *lex loci contractus*. But it is a very different question whether they shall be permitted to operate upon property locally situated in another country, whether movable or immovable, by whose laws such a conveyance would be treated as a fraud upon the unpreferred creditors." (Story's Confl. of Laws, ed. 1852, p. 423; *Bur. on Ass.* 366.)

If this assignment had been made in Missouri, the provision in the deed giving preferences would be void. In other words, such contracts are in violation of the public policy and against the express law of Missouri. Will our courts enforce it? It is a

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very narrow view of the subject to say that our own statute only applies to contracts made in Missouri. This is true. But it declares what the laws of Missouri are ; and the property being in this State, the courts of Missouri will give force and effect to the contract according to those laws. If the plaintiffs were citizens of this State, there would be no hesitation about it, for it has been so decided. (*Bryan v. Brisbin*, 26 Mo. 423.) But we see no reason why a stranger should be placed in a worse condition than one of our own citizens.

In this case it appears from the petition that the attachment was levied on the real estate on the 24th, and the deed of assignment on the 25th of May, 1866, one day after. The attachment was a lien to a certain extent on the property, and places the plaintiffs on the same footing with a resident creditor. (5 La. 295.) This lien was liable to be destroyed by the subsequent recording of the deed of assignment, but it gave the plaintiffs a standing in court which ought to give them the right to ask the enforcement of the contract according to the laws of Missouri.

*Gantt*, for defendants in error.

I. Defendants' deed of assignment must be executed, as far as the administration of the fund is concerned, according to the rights of the parties to it, as ascertained by the law of the place where it was made, and of which all the parties now attempting to challenge it are residents. The provisions of our statute touching assignments (R. C. 1855, p. 210) which were in force when this assignment was made were intended as a substitute for an insolvent or bankrupt law, and the operation of the deed of assignment made in New York must be tested by the law of New York. To the extent that it conveys real property in this State, it must, of course, be conformable to our statutes. But there is no contest respecting the passing of this title to the assignees. The only dispute is as to the trusts with which the legal title is clothed. The question is, to whose use does this title inure ? Defendants in error say that the money arising from reducing the trust fund into money must be applied *secundum formam facti*. The plaintiffs deny this, alleging that the provisions of the deed on

this point are nullities by force of our statute respecting assignments. Turning to that act to ascertain what it declares on this head, we see that the 39th section of the act applies in terms to assignments made "hereafter" in this State. It was the first legal provision by virtue of which preferences in favor of selected creditors were forbidden in Missouri. Repeatedly in the absence of such prohibition the courts of this State have recognized the validity of such preferences. In other words, they have declared that there is no principle of natural equity known to the system of jurisprudence of this country which militates with the giving of such preferences. It results, then, that preferences are valid unless they are forbidden by our statute; and they are not forbidden by our statute unless the deed of assignment was "made in this State" after the act of 1855 took effect, and while it was in operation. As it is part of the case that the deed of assignment was not "made in this State," it seems impossible to render the point under examination more clear than it is upon its mere presentment.

II. Our statute on the subject of assignments was only intended to govern the administration of the effects of an insolvent resident in Missouri, or at least having creditors residing here. If persons residing elsewhere, and owing debts to persons not residents of Missouri, make assignments elsewhere, our courts will only look into them so far as they affect real estate in Missouri. If they are competent to convey the title to such real estate, no contest respecting the administration of the fund arising from the conversion of the real estate into money will be entertained in this State, on the ground that the mode of its distribution among a number of contending creditors is provided by the deed of assignment and recognized by the law of the State where the deed was made. Although, in its broadest terms, and indeed according to the natural import of the language employed, the first section of the act embraces every mortgage, every deed of trust, etc., such has never been the construction which the act has received. It has been held to mean only such assignments as are made in view of insolvency; such as, in the absence of a bankrupt law, may partially supply the place of such legislation.

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But such an act, intended to form a substitute for an insolvent or bankrupt law, has no application to cases where the deed was executed abroad, where the insolvent is a non-resident, all his creditors non-resident; and the only circumstance giving our courts any hold of the matter is that the non-resident held land in Missouri.

By the scope of the whole legislation on this subject, from 1841 (Sess. Acts 1840-1, p. 13 *et seq.*) to 1855, it is plain that assignments made by an insolvent, or debtor in failing circumstances, who resides here, are the only cases for which our statutes make provision. The language employed in section 39, p. 210, R. C. 1855, industriously uses the expression "hereafter made in this State." Though this is the first time when this marked qualification occurs in terms, it is submitted that the inference of such a qualification existing antecedently and inherent, in the nature of the thing, is irresistible. It never was the purpose of the Missouri Legislature to determine how a resident of New York, owing debts to residents of New York and New Jersey, and making there a disposition of his property situated in various places, and among others in Missouri, should be affected by the *lex loci rei sitæ*. The expression found in the thirty-ninth section contains a revelation of the purpose of the legislature, if it was doubtful before, which we deny. It contains the key of the statute. Indeed, just as our legislature did not purpose to lay down rules for the administration of the assets of non-residents among non-residents, our courts refuse to take notice of an assignment made by a non-resident when injuriously affecting a creditor residing in Missouri. (*Bryan v. Brisbin*, 26 Mo. 423.) But a citizen of the State in which a non-resident insolvent is found will not be permitted, even as against the claim of his statutory assignee, to seize his property happening to be found in the State and subject it to attachment. (*Einer v. Beste*, 32 Mo. 240.)

WAGNER, Judge, delivered the opinion of the court.

This was a bill in equity to marshal the assets of Isaac Rosenfield, an insolvent, who had assigned and transferred all his prop-



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erty, both personal and real. Having failed in business in New York, he made a voluntary assignment of his effects, including certain real estate situated in the city of St. Louis, in which certain creditors were preferred. The parties were all residents of New York and New Jersey, and the assignment was valid by the laws of New York where it was executed, but would have been void if made in this State under our statute. The plaintiffs here have a judgment against the insolvent debtor, but it has no priority of lien over the title vested in the assignees; and they insist that the assets arising from the sale of the realty in this State should be distributed *pro rata* and in accordance with our statute. The deed of assignment is regularly executed and acknowledged, so as to be a good and sufficient conveyance to pass the title to real estate in this State. The only question submitted, therefore, is whether the assignment is to be governed by the laws of Missouri.

This proceeding was commenced under the statutes of 1855; and by the thirty-ninth section of the assignment act, as it then existed, it is provided that "every provision in any assignment hereafter made in this State providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." The general rule seems to be well settled that personal property is transferable according to the law of the country where the owner is domiciled; but immovable or real property must be transferred according to the *lex rei sitæ*.

The law of one State cannot, *proprio vigore*, have any force or effect or territorial operation beyond its own limits; and whatever vitality it may obtain in another State is owing solely to the principle of comity. Courts of justice are accustomed, on the grounds of comity, to examine into and enforce contracts made in other States, and carry them into effect according to the laws of the place where the transaction originated — subject, however, to the exception that they will not execute them where it would be against public policy or injurious to their own citizens. In a note to 3 Dallas, 370, Huberus is quoted, where he lays down

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these maxims: "1. The laws of every empire have force within the limits of that government, and are obligatory upon all within its bounds. 2. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary. 3. By the courtesy of nations, whatever laws are carried into execution within the limits of any government are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other government or its citizens." Mr. Justice Cowen, in a very full and elaborate note to the case of *Andrews v. Herriot*, 4 Cowen, 510, deduces the following doctrine: "That the law of a place where the contract is made or to be performed is to govern as to the nature, validity, construction, and effect of such contract; and, being valid in such place, it is to be considered valid and enforced everywhere, with the exception of cases in which the contract is immoral or unjust, or which the enforcing it in a State would be injurious to the rights, the interest, or convenience of such State or its citizens."

In *Bryan v. Brisbin*, 26 Mo. 423, an assignment for the benefit of creditors was executed in Minnesota, making preferences in favor of certain designated creditors, and was valid by the laws of that State; it was held that it would not be enforced by the courts of this State in opposition to the claims of a creditor resident here, who had attached the property previous to notice of the assignment.

In the very recent case of *Guillander v. Howell*, in the New York Court of Appeals (35 N. Y. 657), the action was for the detention and conversion of some boilers. It appeared that the firm of Boardman & Co., residing and doing business in the city of New York, failed in December, 1857; and then, in that city, made a general assignment to the plaintiff, also a resident of that city, for the benefit of creditors, giving preferences. The assignors, at the time of the assignment, had some steam-boilers in New Jersey, which had been manufactured for them by the defendants, and for which they were then indebted to the defendants. After the assignment, the defendants, residents of New Jersey, sold the steam-boilers, under proceedings commenced by

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foreign attachment against the assignors in New Jersey, to satisfy the demand. Plaintiff demanded the boilers, and the defendants refused to deliver them. It was shown on the trial that an assignment giving preferences was void in New Jersey by the laws of that State. The court decided that the property, being situated in New Jersey, was subject to the local laws of that State, and that the assignee could not recover.

So, in *Zipcey v. Thompson*, 1 Grey, 243, it was held that no comity could require the courts of one State to give force to an assignment made in another State, which was not only against their well-settled policy, but against their direct legislation, and the effect of which would be to give preference to citizens of other States over those of their own. The above cases all proceed on the idea that comity does not require a court to enforce a contract valid according to the laws of the place where it was made, if such enforcement would result to the manifest injury or detriment of the citizens of the country where the property is situated or the claim attempted to be enforced.

Every State has the indisputable right to pass laws fixing the status and regulating the disposal of property within her own jurisdiction; and no principle of comity can be allowed to interfere with either her express legislation or what may be deemed sound policy for the protection of her own citizens.

But there is no question arising here between those claiming under the assignment and our own citizens. The parties are all non-residents, and the claimants have no lien springing out of our own laws for which they seek protection. They do not claim the property in specie, nor set up and assert any prior right; but they ask that assets accruing from the sale of the lands may be marshaled, and that they may be permitted to receive a *pro rata* share.

The case, then, presents the simple question of an assignment made in the State of New York, valid by the laws of that State, where the parties are all within the same jurisdiction, except the assignor; and certain of the creditors come here and attempt to defeat the operation and policy of the assignment by an appeal to our laws. In the case of *Einer v. Beste* (32 Mo. 240), this

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court, after a very thorough review of the authorities, decided that where the plaintiffs and defendants were citizens of Louisiana, and the defendants had made an assignment of their property in accordance with the laws of that State, for the benefit of their creditors, and an assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of and residing in the same State, could not secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvents in this State. Whilst, owing to the peculiarities of the code of Louisiana in respect to proceedings in insolvency, the case may not be regarded as absolutely in point, the analogy is cogent, and it must be considered as a strong authority here. The statute refers to assignments made in this State; but had other rights attached, and the interests of our own citizens intervened, I should not be inclined to give it such a narrow construction. The obvious policy of the law was to deny preferences in this State; and it never could be endured that a foreign assignment, made directly in opposition to our legislation, should have the effect of giving an advantage to non-resident creditors to the injury of our own citizens. But as the case presents no such question, we think comity requires and justice will be subserved by holding the assignment good according to the law of the place where it was executed.

The judgment of the court below, therefore, holding this view of the law, will be affirmed. The other judges concur.

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JOHN H. BOBB, Respondent, *v.* EDWARD K. WOODWARD and ERASTUS SMITH, with CHARLES C. WHITTELSEY and WILLIAM P. CURTIS, Appellants.

1. *Practice — Joinder of Causes, legal and equitable — Election.* — Although under our present code a petition may embrace both legal and equitable causes of action, and will not for that reason be held bad upon demurrer, when the relief sought for under the different kinds of action is separately stated, yet the causes cannot be blended in the same trial. And the plaintiff may be compelled, upon motion, to elect on which cause of action he will proceed.

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2. *Practice — Actions — Recovery of Real Property — What the proper action for.* — Where the principal object sought to be accomplished by the plaintiff is to recover possession of real estate, a proceeding in the nature of a bill in equity is not the proper remedy. An adequate remedy at law for that purpose has been provided in the action of ejectment.
3. *Practice — Demurrer — Amendment — Judgment.* — Where, upon demurrer, a petition is held insufficient as to certain defendants, and plaintiff failed to amend, such defendants are entitled to a final judgment and discharge.
4. *Practice — Notice of Suit — Order of Publication.* — The true meaning of the statute concerning notice of suit to non-residents (Gen. Stat. 1865, chap. 164, § 13) is that the notice shall go to the extent of a substantial statement of all the objects of the suit; and notice by publication that the object of a suit was "to set aside" a deed conveying certain property, without any general statement of the grounds upon which the decree was prayed for, is insufficient, and a judgment rendered upon such a notice is null and void.

*Appeal from St. Louis Circuit Court.*

As appears from plaintiff's petition, the conveyances of Woodward, spoken of in the opinion of the court, were as follows:

1. Deed of trust, dated May 22, 1860, conveying certain lots of ground near the Pacific Railroad, in the city of St. Louis, to William P. Curtis, trustee of James Givens Brown, to secure the payment of certain principal and interest notes amounting to \$4,005. 2. Deed of trust upon the same property, dated February 6, 1861, to Charles C. Whittelsey, trustee of Gray & Crawford, to secure a note of \$1,087.80. 3. Deed, dated February 6, 1861, conveying the goods in his place of business in St. Louis, amounting to \$20,000, and book accounts and bills receivable, amounting to \$15,000, for the alleged sum of \$11,360, to defendant, Erastus Smith. 4. Deed, dated April 22, 1861, to Smith, of the lots of ground above mentioned. 5. On the thirteenth day of January, 1867, the same lots were sold under execution against Woodward, and plaintiff became the purchaser.

*Whittelsey*, for appellants.

I. The judgment was irregular for want of service of process upon Smith. (Gen. Stat. 1865, p. 681, § 12; *id.* p. 655, § 13; *Janney v. Spedden*, 38 Mo. 395; *Durossett's Adm'r v. Hale*, 38 Mo. 346; *Roach v. Burnes et al.*, 33 Mo. 319; *Abbott v. Duniwin*, 34 Mo. 148.)



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II. There is a defect of parties upon the final decree, Woodward being a necessary party. (Story Eq. Pl., Red. ed., §§ 207, 210, 216 *a.*, and notes, 236; Shaver v. Brainard, 29 Barb. 25; Ward v. Hollins, 14 Md. 158; 1 Dan. Ch. Pr. 384-88; 2 *id.* 37; Dillon's Adm'r v. Bates, 39 Mo. 292; Greenleaf v. Queen *et al.*, 1 Pet. 139; Van Epps *et al.* v. Van Deusen, 4 Paige Ch. 64, 75; Vanderwerker v. Vanderwerker, 7 Barb. 221, 224; Baldwin v. Lawrence, 2 Sim. & Stu. 18; Court v. Jeffrey *et al.*, 1 Sim. & Stu. 108; Stafford v. City of London, 1 P. Wms. 428.)

III. The petition was defective by combining several causes of action in one count, and the judgment should have been arrested. (Hoagland v. Hann. & St. Jo. R.R. Co., 39 Mo. 457; Clark v. Hann. & St. Jo. R.R. Co., 36 Mo. 202; Ederlin v. Judge, 36 Mo. 350; McCoy v. Yerger, 34 Mo. 104; Gen. Stat. 1865, p. 657, § 2; *id.* p. 660, §§ 18, 23; Story Eq. Pl. §§ 271, 288, 530-41.)

IV. The charges in the petition are inconsistent with each other. (Benoist v. Darby's Ass., 12 Mo. 196, 208; Smith v. Hodson, 4 T. R. 211.)

5. The petition upon its face shows that plaintiff's cause of action is barred by limitations. (R. C. 1855, p. 1047, §§ 1, 3, 5; Maxwell v. Kennedy, 8 How. 210, 222; Hovenden v. Annesley, 2 Scho. & Lef. 607, 638; Keaton v. Greenwood, 8 Geo. 97; Campbell v. Montgomery, 8 Geo. 106; Pierson v. David, 1 Clarke, Io., 23, 32; Van Hook v. Whitlock, 7 Paige Ch. 373; Humbert v. Trinity Church, 7 *id.* 195; Denny v. Gilman, 26 Me. 142; Story Eq. Pl., Red. ed., §§ 484, 503, *n.* 4; State to use of v. Bird, 22 Mo. 470; Taylor v. Blair, 14 Mo. 437.)

VI. Smith as a creditor was entitled to accept a preference, and the price he paid for the debts purchased cannot affect his character as a creditor. (*In re Houghton*, 5 Law Rep. 321; *Ex parte Lee*, 1 P. Wms. 782; Kuykendall *et al.* v. McDonald, 15 Mo. 416, 420; Exchange Bank v. Fitch, 48 Barb., N. Y.; Potter v. Stevens, 31 Mo. 62, 75.)

*Cline, Jamison & Day*, for respondent.

Defendant, Smith, has twice appeared in this case—once to move the court to set aside the judgment by default, and once to

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move in arrest of judgment; and now, after the term has passed at which judgment was rendered, he appears a third time, to move to set aside the default and final judgment, assigning a new ground, viz: the want of proper service. This cannot be done.

I. Defendant, by moving the court to set aside judgment by default against him in this cause, and by his motion in arrest of judgment, submitted himself to the jurisdiction of the court, and waived all errors *in pais*, both as to process and proceedings, except the single question as to the sufficiency of plaintiff's petition to support the decree, which he submitted to the court for its final decision. (Dillingham v. Skein, 1 Hemp. 181; McCoy v. Lemons, *id.* 216; Mahoney v. Penman, 4 Duer, 603; Winchester v. Cox, 2 Iowa, 575; Lampley v. Beavers, 25 Ala. 534; The People v. Banker, 1 Seld., N. Y., 106; Brayton v. Freeze, 1 Carter, Ind., 121; Treiber v. Shafer, 18 Iowa, 29; Bucher v. James, 2 Scam. 462; Whiting *et al.* v. Budd, 5 Mo. 444; Ferris v. Hunt, 20 Mo. 464; Smith's Adm'r v. Rollins, 25 Mo. 410; Whiting & Williams v. Budd, 5 Mo. 443; Carroll v. Dorsey, 20 How. 204; Chaffee v. Hayward, *id.* 208; Townsend v. Stoddard, 26 Geo. 430; Pennio v. Wallis, 37 Miss. (8 George) 172; 12 Ind. 257; Pomeroy v. Pitts & Mellon, 31 Mo. 419; Dillinger's Adm'r v. Higgins, 26 Mo. 180; Baker v. Stonebraker's Adm'r, 34 Mo. 173; Warren & Dalton v. Turk, 16 Mo. 102; Lewis v. Nuckolls, 26 Mo. 278.)

It is admitted that, in cases of defective service, parties can appear for the sole purpose of taking advantage of the defect, whether before or after final judgment; and such appearance constitutes no waiver of the defect, as it is merely coming into court and objecting to the proceedings on the ground of jurisdiction of the person by reason of the defective service. (Lincoln v. Hellers, 36 Mo. 149; Smith's Adm'r v. Rollins, 25 Mo. 408.) But this must be the first appearance of the party and the first step taken by him; if he appears for any other purpose, then the question is waived. (Bohn v. Develin, 28 Mo. 319; Davis v. Woods, 7 Mo. 162; Meyers v. Woolfolk, 3 Mo. 246; Burnell *et al.* v. Lynch, 3 Mo. 261; Malone v. Clark, 2 Hill, 657; Philibart v. Evans, 25 Mo. 323; Dillinger v. Higgins, 26

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Mo. 180; *Hembree v. Campbell*, 8 Mo. 572; 2 Sandf. 209, n. 1; *Malone v. Clark*, 2 Hill, 657; *Rector et al. v. Circuit Court of St. Louis County*, 1 Mo. 433.)

II. Defendant was duly served with notice, and the publication as made called upon him to defend all interest he might have or claim to have in the two lots of ground described therein. It notified him that the plaintiff called upon the court to divest all title to said lot and vest it in him. The nature and character of the suit was to defeat all pretenses and claims of said Smith to said lots; and even if he had not appeared and waived all objection to its sufficiency, it should be held sufficient. (*Stagg v. Franklin & Fitch*, 18 Mo. 299.)

FAGG, Judge, delivered the opinion of the court.

The petition filed in this case contains in its statement of the cause of action two general grounds for relief, blended together in the same count.

The plaintiff below claimed title to certain real estate in the city of St. Louis, acquired by purchase at sheriff's sale under an execution against E. K. Woodward. It was charged that Woodward was then in possession of the property, holding and claiming it as his own. It proceeds to set out with great minuteness a statement of facts tending to show a combination and confederation on the part of Woodward and his brother-in-law, Smith, to cheat, hinder, delay, and defraud the creditors of the former by making a fraudulent sale and transfer of all his property, real and personal. It is alleged that in pursuance of this fraudulent purpose a pretended sale and transfer of a stock of books worth twenty thousand dollars (\$20,000), and the book accounts, notes, etc., amounting to fifteen thousand dollars (\$15,000), was made to Smith in consideration of the sum of eleven thousand three hundred and sixty dollars (\$11,360), no part of which was ever actually paid; that the business was carried on afterward in the name of an agent, under the superintendence and control of Woodward, and for his sole use and benefit; that the real estate mentioned had also been conveyed to Smith, in fraud of the rights of creditors, so as to enable Woodward to use and occupy the same

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for his own benefit, he being at the time wholly insolvent; that previous to these transactions two deeds of trust covering the same property had been executed by Woodward, and that Smith had taken up the notes, which were thereby secured, with means arising from the business carried on as above stated; that these deeds remained unsatisfied upon the records of the county, notwithstanding the debts were thus fully paid off and discharged, and with the conveyance to Smith constituted a cloud on plaintiff's title.

Woodward, together with the trustees mentioned in the deeds, and also Smith, were made parties defendant, and the court was asked to make a decree declaring the deed of conveyance to Smith to be null, fraudulent, and void, as to the plaintiff, and that all of the right, title, and interest in the same be vested in him; that the two deeds of trust be decreed satisfied and paid; and further, that "the court decree the plaintiff entitled to the possession of the two lots aforesaid, and that a writ issue out of the clerk's office of this court, directed to the sheriff, for the possession thereof."

The three first-named defendants were personally served, and appeared and pleaded to the action by way of demurrer. Smith, being a non-resident, was notified by publication, and failing to appear at the proper time a judgment by default was taken against him. This, at the subsequent term of the court, was made final, and the cause dismissed as to the other defendants. The demurrers on the part of these defendants were all sustained, but no amendment of the petition was actually made, and no judgment entered up for them. On the day of the rendering of the final decree in the cause, Smith, appearing by attorney for that purpose alone, moved in arrest of judgment, and afterward moved to set aside the same for irregularity. Both motions being overruled, an appeal has been duly prosecuted to this court.

It is admitted that under our system of practice several causes of action, where they come within the classes designated by the statute, may be united in the same petition. Hence, a petition embracing more than one cause of action, some of which (under the former practice of this State) would have been denominated

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legal and others equitable, will not be held bad upon demurrer, where each with the relief sought for is separately stated. In such case, however, it has been adjudged by this court that they cannot be blended in the same trial; the plaintiff may be compelled upon motion to elect on which cause of action he will proceed. (Mooney v. Kennett, 19 Mo. 551; Janney v. Spedden, 38 Mo. 395; Peyton v. Rose, 41 Mo. 257.)

If it is assumed in this case that the principal object sought to be accomplished by the plaintiff was to recover the possession of the real estate in question, then it is manifest that a proceeding in the nature of a bill in equity is not the proper remedy. An adequate remedy at law for that purpose has been provided in the action of ejectment. (See the authorities above cited.)

The plaintiff claimed the legal title by virtue of the sheriff's deed, which, if valid in law, was sufficient to convey all the title and interest of Woodward; and any prior conveyance that should be interposed to defeat his recovery in such an action could be attacked for fraud. The interposition of a court of equity would not be absolutely necessary to protect him against it. So far as the recovery of the possession of the property itself is concerned, the petition fails to set out the necessary averments to constitute it an action of ejectment. It was an effort to recover possession of real estate by a bill in equity, which cannot be permitted. On the other hand, if it is claimed that it was intended to embrace a statement which would have authorized a trial, as in an action of ejectment, it is fatally defective in blending the different causes of action in the same count.

So much for the question of pleading presented by the record.

We think the court erred in not giving judgment for the defendants, Woodward, Curtis, and Whittelsey, upon the issue joined in their several demurrers. The plaintiff failed to amend his petition after it had been adjudged insufficient as to them. They were no longer to be regarded as parties to the proceeding, but were entitled to a final judgment and discharge. That portion of the petition asking a decree for the possession of the property seems to have been abandoned, and a final decree taken against Smith alone, covering not only the conveyance from Woodward to him,



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but also the deeds of trust. It then concludes by dismissing the cause as to the other defendants, with a judgment in their favor for costs. This is certainly most extraordinary in every point of view. It is not deemed necessary to point out the errors of such a proceeding; they are sufficiently apparent upon a simple statement of the case.

The defendant, Smith, being a non-resident, an attempt was made to notify him of the commencement of the suit by publication. The requirements of the statute in such cases must in all respects be substantially complied with to make the notice sufficient. A notice which falls short in any essential particular of apprising the defendant of the object and general nature of the suit commenced will not be sufficient to authorize a judgment against him. In the case of *Janney v. Spedden*, 38 Mo. 395, the question was as to the validity of a judgment rendered against a non-resident upon constructive notice. The order of publication set out correctly the object of the suit; but the plaintiff, in taking his final judgment, proceeded as upon an amended petition, and it was entered for something wholly different from that stated in the notice.

This judgment was held to be null and void. It appears from the record that the notice to Smith informed him of the commencement of the suit, and that its object was "to set aside" the deed from Woodward to him for the property in question. There is no general statement of the grounds upon which this decree was prayed for. It excludes the idea that any other relief was sought for by the plaintiff. The court could not assume that this was the only matter that materially affected the defendant's rights and interests in the premises. The notice was good enough as far as it went; but the true meaning of the statute in such cases is that it shall go to the extent of a substantial statement of all the objects of the suit. This was not done in the present case, and the judgment rendered upon it must be held to be erroneous. No such appearance was entered for Smith at any stage of the proceedings as amounted to a waiver of the defects contained in the notice.

The other judges concurring, the judgment will be reversed and the cause remanded.

MATTHEW MOORE, Defendant in Error, v. FRANK SAUBORIN,  
Plaintiff in Error.

1. *Practice—Trial—Instructions.*—Where the instructions taken as a whole present the law of the case correctly, any objection to any one by itself, though good, will not be considered a misdirection of the jury.
2. *Actions—Malicious Prosecution, grounds of.*—In an action for malicious prosecution, malice and want of probable cause together constitute the ground upon which alone the plaintiff can recover. The existence of both must be made to appear, although direct proof of malice is not necessary where the want of probable cause is satisfactorily established. In such cases the prosecution must be wholly ended and determined, but proof of innocence is not necessary to support the action.
3. *Actions—Malicious Prosecutions—Declarations.*—In such actions, declarations of the defendant to show that he was not actuated by malice in commencing the prosecution are inadmissible.
4. *Practice—Answer—New Matter—Failure to Reply—Testimony.*—Under the sixteenth and twenty-sixth sections of chapter 165 of the Practice Act (Gen. Stat. 1865, pp. 659, 661), where defendant's answer set up new matter amounting to a substantial defense, and plaintiff failed to reply thereto, such matter stood confessed, and entitled defendant to judgment. He was not bound to introduce any evidence upon that point; and this court will not look to the bill of exceptions for the purpose of ascertaining whether it is sustained by the proof made or not.

*Error to Sixth District Court.*

Defendant in this action had originally instituted proceedings against plaintiff before David Bruner, justice of Montgomery county, upon an affidavit charging him with having stolen a certain neck-yoke and mule-stock. The material facts generally appear in the opinion of the court.

On the trial of the present cause the following instructions were given by the court at the instance of plaintiff, to which the defendant excepted:

1. If the jury believe from the evidence that the defendant made an affidavit before David Bruner, a justice of the peace, and caused the plaintiff to be arrested on a charge of larceny, and that the defendant had not probable cause to believe him guilty of the charge, they will find a verdict for the plaintiff and assess his damage at a sum not greater than three thousand dollars.
2. Although the jury may believe from the evidence that the neck-yoke was the property of defendant, and that it was in the

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blacksmith shop of plaintiff, yet unless the defendant had reasonable cause to believe that the plaintiff had taken, stolen, and carried away the property of defendant, they will find a verdict for the plaintiff.

3. If the jury find from the evidence that the defendant did not have reasonable cause to believe that the plaintiff had taken, stolen, and carried away the neck-yoke of defendant, then the jury may infer malice, and it is not necessary that the plaintiff should prove express malice.

4. If the jury should find a verdict for the plaintiff, they may take into consideration the actual damage, if any, he may have sustained to his character by the prosecution of him by the defendant; the trouble, inconvenience, and expense that he was put to; and also, the insult to his feelings; may render their verdict for any amount not exceeding three thousand dollars.

The court gave, at its own instance, the following instructions :

1. The plaintiff, to sustain his action, must prove malice in defendant, and also that there was no probable cause to institute the proceedings complained of, and that plaintiff has been damaged thereby.

2. That in this case it is not necessary for defendant to prove that the plaintiff stole or intended to steal, or was actually guilty of any offense whatsoever; for if there was any probable cause for the prosecution, the jury must find for the defendant.

3. If the jury find from the evidence in the case that the defendant was not prompted by malice, but solely by a desire to regain his property in a lawful manner, they will find for the defendant.

4. If the jury find that the defendant did wrongfully prosecute the plaintiff without sufficient cause, but was actuated by malice, they will find for the plaintiff.

*F. J. Bowman*, for plaintiff in error.

I. The new matter set forth in the amended answer of the defendant below is a full and sufficient defense to the action; and as no reply was made by plaintiff, the new matter set forth stands

confessed, and judgment should have been entered thereon in favor of the defendant. (Gen. Stat. 1865, ch. 168, § 19; *id.* ch. 165, §§ 12, 16.)

II. The evidence shows that a full and final settlement of the whole controversy, as between the plaintiff and defendant, had been made before the commencement of this suit.

III. In actions for malicious prosecution it must appear that the plaintiff was acquitted of the charge made and complained of; whereas in this case the plaintiff below was found guilty, so far as any decision was rendered, of the charge preferred by the defendant below. (3 Blackst. Com. 126-7; 6 Mod. Rep. 216; 4 Cush. 217; 2 Greenl. on Ev. 452; 39 Penn. St. 288, a case distinctly in point; McCormick v. Sisson, 7 Cow. 715.)

IV. In the examination of David Bruner, defendant should have been allowed to show the conversation between the witness and defendant at the time of making the affidavit complained of, for the purpose of showing the want of malice upon the part of the defendant. (2 Greenl. on Ev. 453-4; Barron v. Mason, 31 Verm. 189; Antoinette Swain v. Jno. M. Stafford, 4 Ired. 392; 4 Verm. 363.)

V. The first instruction given by the court below, at the instance of the plaintiff, directs the jury to find for the plaintiff, although no malice be shown. This was clearly erroneous; for malice, as well as want of probable cause, must be shown, to entitle the plaintiff to recover. (Farmer v. Darling, 4 Bur. 1971, 1974; 39 Mo. 39; 2 Greenl. on Ev. 453; Johnson v. Sutton, 1 T. R. 510; *id.* 349; 1 Brown's P. C. 70.)

VI. If an erroneous instruction is given, the error is not cured by the giving of other instructions which, taken as a whole, may be considered as fairly presenting the law governing the case. (38 Mo. 268; Hickman v. Griffin, 6 Mo. 43; Jones v. Talbot, 4 Mo. 279; Alexander v. Harrison *et al.*, 38 Mo. 268.)

VII. The second instruction given by the court below, at the instance of the plaintiff, is erroneous. (4 Ired. 392; Garton v. De Angelis, 6 Wend. 418; Alexander v. Harrison *et al.*, 38 Mo. 368.)

*L. A. Thompson*, for defendant in error.

I. The court below properly sustained the objection by plaintiff's counsel to the introduction of testimony to show that defendant was advised by the justice of the peace issuing the warrant that a criminal prosecution was warranted. (*Williams v. Van Meter*, 8 Mo. 339; *Beal v. Robinson*, 8 Ired. 276.)

II. The court below properly declared the law in giving the instructions to the jury. (*Hickman v. Griffin*, 6 Mo. 37; *Brant v. Higgins*, 10 Mo. 728; *Casperson v. Sproule*, 39 Mo. 39; *Callahan v. Cafferata*, 39 Mo. 136; *Munns v. Dupont*, 3 Washington's Cir. Court R. 31.)

FAGG, Judge, delivered the opinion of the court.

This was an action for malicious prosecution instituted in the Montgomery Circuit Court. The plaintiff obtained a judgment, which, upon an appeal taken to the Sixth District Court, was affirmed, and the case is now brought here by writ of error.

The points raised by the plaintiff in error refer to the exclusion of testimony offered on the part of the defendant below, the giving and refusing of instructions, and the failure of the plaintiff to reply to the new matter set up in the answer.

This court has frequently held that, when the instructions taken as a whole present the law of the case correctly, any objection to any one by itself, though good, will not be considered a misdirection of the jury.

Malice and want of probable cause together constitute the ground upon which alone the plaintiff can recover in such an action as this. The existence of both must be made to appear, although direct proof of malice is not necessary where the want of probable cause is satisfactorily established.

Without an examination in detail of the instructions given, it will be sufficient to say, generally, that they presented the law correctly, and in all respects as favorably for the defendant as the facts in the case warranted. Both of the instructions asked by the defendant were properly refused.

The theory of the defense, as gathered from these declarations



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of law, as well as the argument here, seems to be that to entitle the plaintiff to recover in this action it was incumbent on him to establish, to the satisfaction of the jury, his innocence of the crime charged against him by the defendant.

Such is not the law. The prosecution, it is true, must be wholly ended and determined; but it does not follow that the actual proof of innocence is necessary to support the action. It can make no sort of difference in this case to consider the extent to which courts have gone in protecting defendants on the ground of probable cause, where they have acted upon the advice of counsel learned in the law. It is clear that the advice of the justice is not such as is contemplated by the authorities upon this point; and the court committed no error in refusing the second instruction. (*Williams v. Van Meter*, 8 Mo. 303.)

It follows, also, that the evidence sought to be introduced upon this point was properly excluded by the court. It is difficult to understand why the declarations of Sabourin, made to Runkle or any body else, should be insisted upon as competent evidence to show that he was not actuated by malice in commencing the prosecution before the justice. There are no circumstances that can justify the introduction of such testimony, and it must be held inadmissible for any purpose in this case. By reference to the pleadings, it will be seen that in the amended answer filed by consent during the progress of the trial, in addition to the specific denial of the allegations in the petition, there is new matter set up by way of defense that was not replied to by the plaintiff. At the time of the return by the constable of the property alleged to have been stolen, with the party accused, it is averred that the property "was then and there delivered to this defendant, and plaintiff and defendant did each pay one-half the costs of said search-warrant, to-wit: the sum of one dollar and fifty cents; and defendant says that a full and complete settlement of all difficulty, damages, and liabilities, as between this defendant and said Matthew Moore, by reason of the issuing of such search-warrant, was then and there made." The sixteenth section of chapter 165, Gen. Stat. 1865, is explicit in declaring that, upon a failure to reply or demur to such new matter "within the time

prescribed by the rule or order of the court, the defendant shall have such judgment as he is entitled to upon such statement."

The provisions of the thirty-sixth section of the same chapter are equally explicit in directing that "every material allegation of new matter contained in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true." We are not called upon to scrutinize very closely the averment of this new matter. There was no demurrer to it. The object evidently was to set up such a settlement or compromise of the whole matter, made between the parties at the time of their appearance before the justice, as amounted to a release of the defendant from all liability on account of the prosecution that had been instituted against the plaintiff. This, if true, was a defense to the action. Without a reply, it stood confessed upon the record and entitled the defendant to a judgment. He was not bound to introduce any evidence upon that point, and we shall not look to the bill of exceptions for the purpose of ascertaining whether it is sustained by the proof made or not.

For this error in the proceedings had in the Circuit Court, the other judges concurring, the judgment will be reversed and the case remanded for a new trial.

It is proper to remark that the transcript does not present this case here in proper shape. There is such a blending together of the record proper with the matters that should be separately presented in the bill of exceptions as to produce great confusion in tracing out the steps taken in the progress of the cause. It is easy enough to have a separate copy made of the entire record in the case, so as to show all the proceedings, with every order and judgment of the court, with the proper dates of filing and entry of the same. Then the bill of exceptions should contain the evidence in the cause, with all the matters of exception that arise during the progress of the trial. In this case the original answer of the defendant is omitted altogether, and the time of trial and filing of amended answer is stated with so much confusion as to make it a matter of doubt whether it was filed before or after verdict. The responsibility of having the transcript in proper shape rests upon the attorneys who bring their causes to this court.

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The additional amount of labor and trouble imposed upon the judges, where they fail to perform their duties in this respect, requires that especial attention be called to the fact, so that it may not occur in future.

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STATE OF MISSOURI *ex rel.* JOHN MCNEIL, Sheriff of St. Louis County, Relator, *v.* THE ST. LOUIS COUNTY COURT, Respondent.

1. *County Auditor — Claim against County, how allowed.*—No authority is conferred upon the county auditor, in any case, to draw a warrant upon the county treasury; nor is his opinion conclusive to the court upon the correctness of any claim against the county. All warrants upon the treasury must be ordered by the court itself.
2. *Account for Services, etc., how allowed against Circuit Court — Construction of Statute.*—An account for services in attending the Circuit Court of St. Louis county, and for stationery furnished thereto, should be audited and allowed by the Circuit Court, under the provisions of the general law relating to this subject. (Gen. Stat. 1865, p. 540, §§ 41-2.) The special law relating to county auditor (Adj. Sess. Acts, 1859, p. 448) has no application to claims of this character.

*Appeal from St. Louis Circuit Court.*

*Harding & Crane, for relator.*

I. The statute constitutes the Circuit Court the tribunal which is to determine the correctness of the accounts of the officers who are charged with furnishing stationery, fuel, attendance, etc., required for the use of the court. (Gen. Stat. 1865, p. 540, §§ 41, 42.)

II. The action of the Circuit Court must of necessity be final. If not, the County Court, an inferior tribunal, may annul or reverse the action of the superior court, viz: the Circuit Court.

III. The County Court has charge of the funds of the county, and has to pay the debts incurred by it. The claim in this case is one of their debts, which has already been proved, allowed, and audited by the court designated to perform that duty.

IV. The act respecting the county commissioners (Adj. Sess.

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Acts 1859, p. 448; see laws applicable to St. Louis county, p. 46, §§ 23-4) does not make it the duty of the auditor to audit accounts of this nature; and if it did, it is modified or repealed in respect to such demands by the General Statutes.

*Kehr*, for respondent.

Respondent bases its action upon sections 23, 34-38 of "An act concerning the county of St. Louis," approved March 14, 1859. (Laws applicable to St. Louis county, p. 46.) Gen. Stat. of 1865, chap. 133, p. 540, §§ 41-2, must be regarded as modified by this act when applied to St. Louis county.

I. Although section 42 authorizes the Circuit Court to "adjust the account" and "certify the same for payment," there is nothing in the language employed to prohibit an account thus audited from being subjected to the same process of adjustment which applies to other demands against the county. The fact of its being audited may be regarded as evidence to be submitted to the auditor to enable him to recommend the claim in his periodical report, and thus full force may be given to both laws.

II. The act of March 14, 1859, is not repealed by Gen. Stat. 1865, because: 1. Sections 41-2, chap. 133, do not operate as an original act of 1865; but, being merely reprints of §§ 71-2, p. 543, R. C. 1855, simply continued in force in the revision of 1865, their existence dates back to their first enactment. The mind of the legislature was therefore especially directed to the general law when the special law was enacted, and the revision of 1865 cannot be held to repeal the special act. (*City and County of St. Louis v. Alexander*, 23 Mo. 509; *State ex rel. Vastine v. Judge of St. Louis Prob. Ct.*, 38 Mo. 534.) 2. Chap. 224, p. 883, § 6, continues the special act in force, because there is nothing in the latter act inconsistent with or repugnant to the general law of 1865. The question how far a private, local, or temporary act is affected by a subsequent general law, has been fully and elaborately examined by the court in the cases of *Deters v. Renick*, 37 Mo. 597; *State ex rel. Vastine v. Judge St. Louis Prob. Ct.*, 38 Mo. 529; *State ex rel. Mo. & Miss. R.R. Co. v. County Court of Macon County*, 41 Mo. 453.

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III. The act concerning courts (Gen. Stat. 1865, p. 540, § 41) must be held to be, in its feature respecting the auditing by the Circuit Court of the accounts therein referred to, inapplicable to St. Louis county. The County Court, by the act of March 14, 1859, was expressly inhibited from acting upon or considering any demand whatever against the county, unless the same were first presented, with the evidence in its favor, to the auditor of St. Louis county.

FAGG, Judge, delivered the opinion of the court.

The application of the relator shows a refusal on the part of the respondent to draw a warrant on the St. Louis county treasury for the amount of an account duly certified for payment by the Circuit Court.

The facts stated in the application for the rule are not denied by the answer.

The cause shown by respondent against issuing the peremptory writ is simply a denial of the authority of the Circuit Court to audit any claims whatever against the county, and an allegation to the effect that that duty can alone be performed by the auditor of the county.

The case is to be considered upon a demurrer to the return. The items in the account were for days' services in attending the Circuit Court and for stationery furnished, amounting altogether to the sum of \$97.25.

The office of county auditor does not exist in this State except by virtue of special legislative enactment. It seems to have been created in the county of St. Louis by an act of the legislature, approved March 14, 1859, entitled "An act concerning the county of St. Louis." (Adj. Sess. Acts 1859, p. 448.) Section 23 of this act is as follows: "The auditor of St. Louis county shall be the general accountant of said county, and the keeper of all public account books, accounts, contracts, vouchers, documents, official bonds, and all papers relating to the accounts and contracts of said county and its revenue debt and fiscal affairs not herein required to be kept by some other persons."

In addition to those specifically enumerated in this statute, he



is required to perform the same duties imposed upon the clerk of the St. Louis County Court by an act of the legislature, approved November 20, 1867. Taken altogether, it would seem to have been the intention to create an office in which the proper books and accounts should be kept and the vouchers preserved, so that the true financial condition of the county, together with its liabilities and expenditures, could be ascertained at any moment. The information to be furnished by this office is not exclusively for the benefit of the County Court. The books are directed to be kept open to the inspection of the public, and to that extent are a check upon the action of the County Court as to all matters properly belonging to the office. The auditor is especially required to report at each session of the court all claims against the county upon which he may have acted since its last session, together with his opinion briefly expressed upon the merits of each. No authority is conferred upon him, in any case, to draw a warrant upon the county treasury, nor is his opinion conclusive upon the court as to the correctness of any such claim. On the contrary, all warrants upon the treasury must be ordered by the court itself, thus giving to that body power to allow and pay the amount of a claim, notwithstanding the objections of the auditor.

A quarterly statement of the fiscal affairs of the county is required to be published by the auditor; and in all cases where an adverse report is made by that officer, and the claim is nevertheless allowed by the court, that fact is to be noted, together with his reasons for its rejection.

The true spirit and intent of the whole act, then, seems to be to guard against corruption in the allowance and payment of claims against the county, in all cases where the County Court is authorized to pass upon their correctness, and to place the facts within reach of the public. It is contended, on the part of the respondent, that this special law is broad enough to embrace every class of claims against the county; that its provisions are so inconsistent with and repugnant to the general law requiring accounts like this one to be audited and allowed by the Circuit Court that the latter must be held inoperative as to St. Louis county. We cannot concur in that opinion. The object of this

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Barker, Adm'r of Trumbo, v. Trumbo.

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special law, and the reasons operating upon the minds of the legislators in framing its provisions, have no application to claims of this character. The general law directs all such accounts to be audited, adjusted, and certified for payment by the court in which the services are rendered and the articles furnished. Such tribunal is presumed to have the means of determining almost with positive certainty as to the correctness of the items of such an account. What necessity can be shown for requiring a claim thus audited and allowed to undergo an examination by the auditor? It will not be pretended that a claim for similar services in the County Court itself would have to pass through the hands of the same officer before the County Court would be authorized to order a warrant for its payment.

There appears to be just as much reason for the requirement in the one case as in the other. We conclude, therefore, that it was not intended by this special law to deprive the Circuit Court of the power conferred by the general statute to pass upon the correctness of the accounts of its officers and servants.

There is nothing repugnant in the provisions of the two statutes, and the general law is as applicable to St. Louis in such cases as to any other portion of the State.

The demurrer will be sustained and a peremptory mandamus awarded. The other judges concur.

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ARMSTRONG D. BARKER, Adm'r of the Estate of ELIJAH TRUMBO,  
Respondent, v. ISAAC TRUMBO, Appellant.

1. *Practice—Appeal—Failure to Prosecute.*—Where the record of a case shows that an appeal was taken therein more than thirty days prior to the term of this court, when the same is called for hearing, and appellant has entirely failed to prosecute his suit, no cause being shown for the delay on the part of appellant, the judgment of the lower court will be affirmed.

*Appeal from the Sixth District Court.*

*Ewing & Holliday*, for respondent.

*Carr & Bruce*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

The record in this case shows that the appeal was taken more than thirty days before the commencement of the present term of this court, and that the appellant has entirely failed to prosecute his suit. The respondent now presents to the court here a perfect transcript of the record, and asks for an affirmance of the judgment. No cause being shown for the delay on the part of the appellant, the judgment will be affirmed. The other judges concur.

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STATE OF MISSOURI, Respondent, v. JEHIAL RASHBAUM, Appellant.

1. *Interest — License — Court of Criminal Correction, jurisdiction of.* — The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts 1865, p. 252) is repugnant to the general statute concerning interest (chap. 89), and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93-6), and by virtue of § 2, chap. 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.

*Appeal from St. Louis Circuit Court.*

*Eaton*, for appellant.

I. Section 6 of the act incorporating the Missouri Benevolent and Loan Association has been repealed by implication. As it professes to be a general law, and is no necessary constituent part of the charter, and could not well be made one, it certainly might be repealed either directly or by implication. A subsequent law on the same subject matter naturally would repeal this, unless it professed on its face not to give the general law on the subject. Chapter 89, Gen. Stat. 1865, professes to regulate the law of interest, and does determine that law unless this section is an addition to that law overlooked by the revising legislature and left in force. But if this section was a part of the general law of the State relating to interest up to the date of the adoption of

the General Statutes, then by terms of section 2, chapter 224, it was repealed, for the general law of interest was "embodied and re-enacted in whole or in part in the General Statutes." Again, the general law of licenses is re-enacted in whole or in part in chapters 93-8, but nowhere is any reference made to pawnbrokers. Certainly if the legislature intended to require of them a license from the County Court, it would have re-enacted the law in a similar chapter. We must infer, therefore, an intent to repeal. By section 35 of article 4 of the first constitution of Missouri, a decennial revision of "all the statute laws of a general nature, both civil and criminal," was ordered, and the "General Statutes" as they now stand originated in a compliance with that order. It seems obviously fair to hold that the legislature fulfilled the mandate of the constitution in its work.

II. By section 1, paragraph 18, article 4, of the charter of the city of St. Louis, the city council is authorized to license, tax, regulate, or suppress pawnbrokers. This act was approved March 13, 1867.

*Colcord & Clover*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

This was an information filed in the St. Louis Court of Criminal Correction against the defendant, as a pawnbroker, for a misdemeanor under the sixth section of an act incorporating the Missouri Benevolent and Loan Association, approved February 20, 1865. (Adj. Sess. Acts 1865, p. 252.)

This section provided that a pawnbroker should be licensed by the County Court of the county, under penalty of prosecution by indictment; that a licensed pawnbroker might take twenty per cent. interest for the use of money upon pledge or otherwise; and that the act should be taken to be a public act, and, as such, have the effect and operation of a general law.

These provisions came within the purview of the second section of chapter 224 of the General Statutes, which provided that "all subsequent acts of a general, public, and permanent nature, embodied and re-enacted in whole or in part in the General

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Statutes, or repugnant thereto," should be repealed. It did not come within the exceptions of sections 5 and 6 of the same acts. It is repugnant to the general statutes concerning interest (chap. 89). It is inconsistent with the general statutes concerning licenses of merchants, brokers, and others (chap. 93-6).

Moreover, it contained a special provision that a prosecution under the act should be by indictment.

For these reasons we think it is very clear that the Court of Criminal Correction had no jurisdiction over the case. The judgment will be reversed and the information dismissed. The other judges concur.

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ELIAS E. WILLIAMS, Respondent, v. JOHN FIEGLER, Appellant.

1. *Practice—Appeals—Filing of Transcript.*—Where the record of a cause shows that an appeal therein was taken to this court more than thirty days before the first day of the term in which the same is called for hearing, and that no transcript was filed by the appellant, and no satisfactory reason is shown why it was not filed, the judgment of the lower court will be affirmed.

*Appeal from St. Louis Circuit Court.*

*J. Wickham*, for respondent.

*A. McElhenney*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

The respondent in this cause now comes and presents a perfect transcript of the record, and asks for an affirmance of the judgment rendered in the Circuit Court, on the ground that the appellant has failed to prosecute his appeal as required by the statute. An examination of the record shows that the appeal was taken more than thirty days before the first day of the present term of this court, and that no transcript was filed by the appellant; nor is any satisfactory reason shown why he did not file the same.

The judgment will therefore be affirmed. The other judges concur.



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State of Mo. ex rel. Third National B'k of Mo. v. Bishop.

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STATE OF MISSOURI *ex rel.* THIRD NATIONAL BANK OF MISSOURI,  
Petitioner, *v.* WILLIAM BISHOP, Respondent.

1. *Mandamus — Payment by State Treasurer — Authority.*—Mandamus will not lie to compel the State treasurer to pay over the principal and interest of State bonds, without a special act of the legislature authorizing and commanding him to pay. Without such special act, he has no power to pay any money, except upon the warrant of the auditor drawn upon some appropriated fund.

*B. A. Hill*, for petitioner.

I. The fourteenth section of the bank act of March 18, 1861, gives the revenue bonds issued by authority of said act the priority over all other bonds of the State, and requires them to be paid out of any moneys remaining unappropriated in the treasury. The revenues of the State are pledged for the payment of the principal and interest on these bonds. It is not a part of the revenues, but all the revenues — the revenue of the State at large.

*Wise*, for respondent.

The treasurer has no power to pay out money, except upon warrants drawn upon him by the auditor. (Gen. Stat. 1865, § 30, p. 89, § 39, p. 90.)

I. The above is a general statute, and binding, unless a specific mandatory statute is passed by the General Assembly, and then the auditor must draw his warrant to authorize the treasurer, unless the act clearly dispenses with such necessity.

II. Act of 1861, p. 13, § 14, is very far from being sufficient authority even to the auditor to draw his warrant on the treasurer, much less to the treasurer to pay on demand.

WAGNER, Judge, delivered the opinion of the court.

The relator states in his petition for a mandamus that certain revenue bonds were issued under an act of the General Assembly of the State of Missouri, approved March 18, 1861, and that the revenues of the State were pledged by the act for the payment of the principal and interest thereon; that a part of these bonds

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are the property of the relator ; that they are due, and that payment has been demanded of the State treasurer and refused ; that \$650,000 of money not specially appropriated for any purpose is now in the State treasury, and that the refusal of the treasurer to pay is a violation of the law.

The treasurer, for return to the alternative writ, says that at the time of the said demand and at the present time there is no money in his hands, as treasurer, with which he can legally pay the said demand, or any part thereof ; he further states that there never has been any appropriation by act of the legislature authorizing him to pay said bonds or any part of them ; he denies that there is in the treasury, or subject to his control or order, after paying the sums appropriated for carrying on the State government and liabilities having priority over said bonds, any money whatever which he can legally apply to the payment of the bonds or any part of them, and he therefore denies that his refusal to pay was in violation of law. To this return there was a demurrer.

The act of March 18, 1861, authorized the Governor to issue revenue bonds, payable in three and five years, bearing interest at the rate of nine per cent. per annum, with coupons attached, for certain moneys advanced by the banks to the State ; and the act provided that for "the payment of the principal and interest on said bonds the revenues of the State are hereby pledged."

It is not alleged that there has been any appropriation by the legislature designating or setting apart any fund for the payment of the bonds and interest. The statement of the treasurer, that there are no funds in the treasury other than what is specifically appropriated, which statement is admitted by the demurrer to be true, is of itself sufficient to preclude the issuing of the mandamus. But were there sufficient funds, the treasurer would not be authorized to pay simply because the legislature had pledged the revenue of the State for that purpose. It would require a special act authorizing and commanding him to pay. Under the law organizing the treasury department, the treasurer is required to keep a just and true account of each head of appropriation made by law, and the disbursements made under

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the same, and to disburse the public moneys upon warrants drawn upon the treasury according to law, and not otherwise. Without some special act thereto authorizing the treasurer, he has no power to pay any money, except upon the warrant of the auditor drawn upon some appropriated fund.

That the money was advanced or loaned upon a pledge that the revenues of the State should stand security for its payment may furnish a strong reason why the legislature should make an appropriation and provide for its liquidation, but it will not empower or justify the treasurer in paying it without authority of law.

Mandamus refused. The other judges concur.

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STATE *ex rel.* JAMES SHIELDS, Relator, *v.* E. B. SMITH, Clerk  
Washington County Court, Respondent.

1. *Registration of Voters—Appointment of Registers.*—Under the second section of the act to provide for the registration of voters (Gen. Stat. 1865, p. 905), the registers in the election districts appointed in July, 1866, hold for two years; and when the new county supervisor of registration was elected in November, 1866, the appointment of new registers did not devolve upon him.

*G. I. Van Allen*, for relator.

*R. F. Wingate*, attorney-general, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The relator states in his petition that one Wm. Moran was, at the general election in November, 1866, elected supervisor of registration in and for Washington county, and that he has been duly commissioned and qualified as such; that a special election having been ordered to take place in November next, the said Moran appointed the relator as registering officer for Breton election district, in said county, to complete the list of registered voters; and that the county clerk refused and still refuses to deliver to him the list of registration made in 1866, claiming that another person is yet registering officer for that election district,

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who is entitled to the same. The only contest is whether, by the second section of the act to provide for the registration of voters, the registers in the election districts appointed last year hold for two years, or whether, when the new county supervisor was elected last year, the appointment of new registers devolved on him when he was inducted into office. The first supervisor of registration was appointed by the Governor, and the section above referred to says: "During the first ten days of July (1866) next ensuing his appointment, the supervisor of registration shall proceed to appoint one competent and prudent person, who is a qualified voter, in each election district of such county, as an officer of registration, who shall serve as such until the next biennial appointment of officers of registration." Section 28 provides for the election of a supervisor of registration at the general election in 1866, and at every general election thereafter, and says that he shall be governed by and be subject to all the provisions as prescribed in the act.

The law seems very clear, and there is no room left for construction. The first appointment was made in July, 1866, and the enactment is that the officer "shall serve as such until the next biennial appointment of officers of registration. The word "biennial" is derived from the latin words *bis*, twice, and *annus*, year, meaning the happening or taking place of anything once in two years. The law provides for a general election once in every two years, and the election of 1866 was equally a biennial election with the one which will take place in 1868. So with regard to the appointment of registration officers for the election districts; the first biennial appointment was in July, 1866, and the next biennial appointment cannot occur till July, 1868, two years thereafter.

Mandamus refused. The other judges concur.

[END OF MARCH TERM, 1868.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
JULY TERM, 1868, AT JEFFERSON CITY.

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WILLIAM SMITH, Respondent, *v.* R. B. OWENS, Appellant.

1. *Constitution—Military Officers—Pleas in Bar.*—The fourth section of art. 11 of the constitution of Missouri is a complete bar to actions or proceedings against any person acting by virtue of military authority vested in him by the government of the United States or of this State, on account of any act done by virtue of such authority. (*Drehman v. Stifel*, 41 Mo. 184, cited and affirmed.)

*Appeal from Third District Court.*

*Phelps*, for appellant.

I. Defendant, at the time the horse was claimed by plaintiff, was an officer on duty in the army of the United States, and was ordered by his superior officers not to give up the horse. He is, therefore, completely protected by said military orders. (Sec. 4, art. 11, Constitution, and sec. 2, Vacating Ordinance of Convention of Mo. 1865; *Drehman v. Stifel*, 41 Mo. 184.)

II. A person in the military service is not liable to a civil action for taking property for the use of the army by order of



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his superior officers. The order of his superior officer is a complete protection, aside from the provision of the constitution. The inferior is not the judge of the necessity for the seizure.

*Baker & Ellis*, for respondent.

I. The government can do no wrong, and where its agent commits a tort it is the individual act of the agent. (*Little v. Barrows*, 2 Cranch, 176; *Mitchell v. Hanway*, 13 How. 128.)

II. This case does not come within the principle of the case of *Drehman v. Stifel*, 41 Mo. 184; for in this case the entire cause of action accrued before any order by a superior officer was given to the defendant, and the suit was pending before said order was given. It does not come within the provision of the constitutional protection to military officers, for the horse in controversy was purchased by the government, whose title or purchase is to be judged just as the title of any other purchaser.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action in Greene Circuit Court for the recovery of specific personal property, to-wit: One sorrel horse, which, he alleged in his petition, belonged to him and was illegally detained and converted by the defendant. Defendant stated in his answer that at the time of the commencement of the action, and prior thereto, and after that date, he was assistant quartermaster of volunteers in the United States army, and that the said horse, in the petition mentioned, came into his hands and under his control as such quartermaster, in pursuance of the regulations of the army and the orders of his superior officers, while the defendant was in the active military service of the United States as such assistant quartermaster; that the horse was branded "U. S."; that he had been captured from the enemy, or had otherwise come into the possession of the military authorities of the United States; that the defendant received the horse as the property of the United States, in pursuance of the regulations of the army and the order of his superior officers, and detained the same until he died or was killed. The defendant then pleaded, as

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a bar to the action, the second section of the ordinance of the convention of this State, entitled "An ordinance providing for the vacating of certain civil officers of the State, filling the same anew, and protecting the citizens from injuries and harassment;" and also the fourth section of the eleventh article of the constitution.

On the trial the plaintiff introduced testimony showing that the horse in controversy was his property; that he was the owner and in possession of the said horse in the month of September, 1863; and that the horse was stolen or taken from the plaintiff without his consent, leave, or knowledge, by some person or persons unknown, and that he was not seen again until the month of November, 1864, when he was found among some horses belonging to the United States army, in possession of the defendant, as quartermaster for the district of Southwest Missouri.

The defendant proved that the horse in question was obtained by Captain Montgomery from the quartermaster of the Second Missouri Artillery volunteer regiment, on a requisition signed by him, for the use of the men under his command, he then being in command of a company in said last-named regiment; that some men in his company deserted with their horses, and that one of them deserted with the horse in controversy; that the deserters were arrested, and that the horse in question, together with another horse, was, by the provost marshal at the post of Springfield, turned over to defendant, as quartermaster, who gave his receipt for the same; that at the time the said Montgomery drew said horse he was branded on the left shoulder and left hip with the letters "U. S.," indicating that the said horse had been purchased for the use of the army.

It was further testified that the commander of the post, by order of the district commander, ordered the defendant not to deliver the horse to the plaintiff, and not to permit the sheriff, who had the writ in this case in his hands, to execute the same; and that by virtue of an order issued by the provost marshal the horse was placed in the stockade prison, where he was subsequently killed.

At the request of the defendant, the court instructed the jury

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that, if they believed from the evidence that the horse in question came into the possession of the defendant as quartermaster of United States volunteers, by act of the military authorities of the United States, and that the military authorities, before the commencement of this suit, ordered the defendant, as such quartermaster, to retain said horse in his possession, and defendant did so retain the same, then the jury should find for defendant. The court refused all the instructions asked for by plaintiff; and the jury having found a verdict for defendant, judgment was rendered thereon in his favor. The case being carried to the District Court, the judgment of the lower court was reversed and the cause remanded, from which decision an appeal was taken to this court.

The instruction given for the defendant is based on the theory that the case falls within the indemnity granted by the second section of the ordinance commonly known as the vacating ordinance, which was afterward inserted in the constitution. (§ 4, art. 11, Const. of Mo.) Had there been no such constitutional provision, the instructions asked for by the plaintiff and refused by the court would have been unobjectionable. But they were rightfully refused, because they ignored wholly the provisions of the constitution and the ordinance.

The case comes within the meaning, spirit, and letter of the sections above referred to; and the instruction given by the court, on which the verdict was rendered, was, we think, unquestionably correct. The defendant committed the act of retaining the property by virtue of orders from his superior officer in command, who was vested with authority by the government to judge of the exigencies of the service. It is unnecessary to go into a re-discussion of the principles and the proper interpretation to be given to the subject, as the whole matter was most elaborately considered by this court in the case of *Drehman v. Stifel*, 41 Mo. 184. While the two cases are not parallel or analogous in all particulars, yet the reasoning and principles laid down in *Drehman's* case must have a controlling and decisive influence here.

The result is, the judgment of the District Court must be reversed and that of the lower court affirmed.

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Vitt v. Owens et al.

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JOHN T. VITT, Petitioner, v. JAMES W. OWENS *et al.*, Respondents.

1. *County Courts — Repairs of County Buildings — Prohibitions.*—The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. (Gen. Stat. 1865, ch. 36, and ch. 137.) These matters belong to the administrative and ministerial functions of the County Court, and not to the judicial branch of their jurisdiction. And for this reason it has been decided that even a prohibition will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. Even where a court of equity has jurisdiction to grant an injunction to restrain proceedings at law, it is never granted directly against a court, like a prohibition, but only against the persons who are parties to such proceedings, without impeaching the jurisdiction of the court itself.
2. *County Courts — Repairs of County Buildings — Mandamus — Injunction.*—Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.

In this case no counsel appear of record.

HOLMES, Judge, delivered the opinion of the court.

This is a suggestion on behalf of John T. Vitt, presiding justice of the County Court of Franklin county, representing to us that the defendant, James W. Owens, judge of the Ninth Judicial Circuit of this State, and others who are parties plaintiff in a certain cause pending in the Circuit Court of Franklin county, are proceeding in said cause in respect of a matter over which the said Circuit Court has no jurisdiction, and are therein transgressing the bounds of the lawful jurisdiction of said court. The suggestion is accompanied with an exemplification of the record of

the proceedings in said cause, and prays for a writ of prohibition. To the rule granted requiring the defendants to appear and show cause why a prohibition should not issue, they severally make return, substantially admitting the facts suggested, and the case is submitted upon a demurrer to the return.

Giving all possible weight to the statements made in this return, there appears to be nothing in it which can afford any justification whatever in support of these proceedings, upon any grounds of law or equity.

It appears by the suggestion that the County Court of Franklin county had taken some steps toward submitting the question of a removal of the county seat of said county to a vote of the people, under the statutes relating to that subject; and further, that in the meantime the court was proceeding to make certain repairs, by them deemed necessary, upon the court-house in the town of Union. It appears further that certain citizens and taxpayers of the county (defendants herein), believing such repairs to be injudicious and unnecessary, filed a petition in the Franklin Circuit Court, stating the facts in detail, and praying the court to grant an injunction against the justices of the County Court to restrain them from any further proceeding in the matter of making such repairs; and, upon application to the judge of the Circuit Court in vacation, a temporary injunction was granted. It appears, also, that the presiding justice of the County Court was afterward committed to jail for an alleged contempt in disobeying said injunction.

The petition (as appears by the exemplification of the record) prayed for an injunction; the order granted is in effect an injunction, and is so called; but, besides the name, we discover no other element or feature in this proceeding which can properly be said to be of the nature of a petition in equity for an injunction. The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. (Gen. Stat. 1865, chap. 36, chap. 137.) These matters belong to the administrative and ministerial functions of the County Courts, and not to the judicial branch of their jurisdiction; and for this reason it has been decided that even a prohibition



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will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. (State *ex rel.* West v. County Court of Clark County, 41 Mo. 44.) Even where a court of equity has jurisdiction to grant an injunction to restrain proceedings at law, it is never granted directly against a court, like a prohibition, but only against the persons who are parties to such proceedings, without impeaching the jurisdiction of the court itself. (Sheffield v. Duchess of Buckinghamshire, 1 Atk. 630; Portarlington v. Soulby, 3 M. & K. 107; Adams' Eq. 195.) In this matter of repairs, the County Court was proceeding, of its own motion, in the exercise of its proper jurisdiction, and there were no parties to any suit at law. It is true that in proceedings of this nature, where there is no appeal or writ of error, the Circuit Courts have a superintending control over the County Courts, which may be exercised in certain cases and in a proper way, according to the usages and principles of law. (Titherow v. Grundy County Court, 9 Mo. 117.) It might be exercised in a proper case by mandamus. (West v. Clark County Court, 41 Mo. 44.) But where the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, as in the matter of establishing or vacating public roads, it has been held that a mandamus will not lie from the Circuit Court. (County Court v. Round Prairie Township, 10 Mo. 679.) We need not undertake to define in what cases the Circuit Court might interfere by mandamus. It is sufficient to say that here was no proper case even for this remedy, and much less for the remedy by injunction. Moreover, there was no equity in the petition on which an injunction could properly be granted. The facts stated made no case that would come under any head of equity jurisdiction for relief. The plaintiffs therein had no greater interest in the matter than any other tax-payers. No injury was done to them, no irreparable damage threatened, in respect of their property or private rights. It was simply a matter affecting the public interest and convenience, and one which the law had submitted to the judgment and discretion of the County Court. Whether that discretion was properly exer-

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cised or not, the facts stated in the petition afforded no basis whatever for equitable relief in favor of the plaintiffs, by injunction or otherwise, against the County Court or any other parties defendant. In such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law; and the proceeding must be treated here and for all the purposes of this application as a nullity. It was not merely a transgression of the bounds of the proper jurisdiction of the court or judge, but an exercise of judicial authority where no jurisdiction existed; and there can be no question but that we are fully warranted by the authorities in granting a prohibition. (Thomas v. Mead, 36 Mo. 232.)

Rule absolute. The other judges concur.

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JEFFERSON CITY SAVINGS ASSOCIATION, Plaintiff in Error, v.  
A. W. MORRISON, Defendant in Error.

1. *Practice, Civil—Appeals—Act establishing District Courts—Power of Circuit Judge to grant Appeals in Vacation.*—Where, nineteen days after the entry of a judgment in a Circuit Court, and in vacation, the judge before whom the cause was tried indorsed upon the transcript an order allowing an appeal to the District Court, and no reason was given for making this order, and no statement made in reference to it, except that it was done upon an inspection of the record: *held*, that such appeal was improperly entertained by the District Court, and ought to have been dismissed. Although in the act establishing District Courts the legislature failed to designate in express terms the manner of taking appeals or prosecuting writs of error from the Circuit Court, it evidently intended to make the provisions of the act of 1855 applicable to the new system contemplated by the constitution. Hence, to make an appeal from the Circuit to the District Court in all respects regular and proper, it is still necessary to comply with the provisions of that act—no provision of the statute, either expressly or by inference, authorizing the judge of a Circuit Court in vacation to make an order allowing such appeal. The powers formerly conferred upon the Supreme Court, or any judge thereof, to act in similar premises, have not been transferred to the District Courts.

*Error to Fourth District Court.*

*Ewing & Smith*, for plaintiff in error.

*Lay & Belch*, and *G. T. White*, for defendant in error.

FAGG, Judge, delivered the opinion of the court.

This cause is brought here by writ of error from the First District Court, where it was determined upon an appeal from the Circuit Court of Cole county. The first inquiry arising upon the record is in relation to the appeal, for the purpose of ascertaining whether the District Court was regularly possessed of the cause so as to authorize it to proceed to a final determination of it. The transcript shows nothing but the petition and summons, with the return of the officer and the judgment of the Circuit Court. The judgment having been rendered on the third day of the term, a motion was filed on the tenth day of the same term to set it aside. A brief entry was made of this motion, without copying it, and also a similar entry made two days thereafter that it was overruled by the court. There was no application for the allowance of an appeal during the term; no affidavit made, and no steps taken at the time to meet the requirements of the statute in such cases. The entry of the judgment was made on the 8th day of August, 1866; and, on the 27th day of October following, the judge before whom the cause was tried indorsed upon the transcript an order allowing an appeal to the District Court. No reason is given for the making of this order, and no statement made in reference to it, except that it was done upon an inspection of the record. It is clear that, in attempting to carry out the provisions of the constitution requiring the establishment of district courts, the legislature failed to designate in express terms the manner of taking appeals or prosecuting writs of error from the Circuit Court. It is, however, sufficiently apparent that it was intended to make the provisions of the act of 1855 upon that subject applicable to the new system contemplated by the constitution. Hence, to make an appeal from the Circuit to the District Court in all respects regular and proper, it is still necessary to comply with the provisions of that act. It does not appear that any effort whatever was made in this case to pursue the directions of that statute. The judge, in making the order in vacation, must have proceeded upon the idea that the power formerly conferred upon the Supreme Court

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Jefferson City Savings Association v. Morrison.

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or any judge thereof had been transferred to the District Court. We do not feel at liberty to adopt such a construction of the statute. There is no express provision authorizing it, and nothing from which such an intention can be inferred. The appeal was, therefore, improperly entertained by the District Court, and ought to have been dismissed. This view of the case precludes any inquiry into the question of error apparent upon the record, and is sufficient to authorize the reversal of the judgment of the District Court.

The other judges concurring, the judgment of the District Court is reversed and the cause ordered to be stricken from the docket of that court.

[END OF JULY TERM, 1868.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,

AUGUST TERM, 1868, AT ST. JOSEPH.

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ISAAC COKER, Respondent, *v.* ALEXANDER SCOTT *et al.*, Appellants.

1. *Appeal, failure to prosecute.*—When no steps are taken to prosecute an appeal, the judgment of the court below will, on motion, be affirmed.

*Appeal from Fourth District Court.*

*J. F. Asper*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The record in this case shows that an appeal was prayed for and allowed in the Fourth District Court on the — day of January, 1868, but that no steps have been taken to prosecute said appeal on behalf of the appellants. The respondent now produces in this court a perfect transcript of the record, and moves the court for an affirmance of the judgment.

The motion will be sustained and the judgment affirmed. Judge Fagg concurs.



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State of Missouri, to use of Ladd, v. Clark et al.

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STATE OF MISSOURI, TO USE OF JACOB B. LADD, Defendant in Error, v. WILLIAM W. CLARK *et al.*, Plaintiffs in Error.

1. *Statutory Actions—Averments.*—In a statutory action against a constable for wrongful attachment, the petition need not declare specifically that at the time of the attachment and levy the plaintiff was not a non-resident, nor was about to remove out of the State with intent to change his domicile.
2. *Practice—Statutory Action—Proviso, must be pleaded.*—If the proviso contained in a statute furnishes matter of excuse for the defendant, it need not be negatived in the petition, but he must plead it. And it makes no difference whether the proviso be contained in the enacting clause or be subsequently introduced in a distinct form. It is the nature of the exception, not its location, which ought to govern.
3. *Practice—Statutory Action—Exceptions in Statute—Pleading.*—Where in the same section of the statute in which the right of action is given the exception is contained, and it clearly appears that the plaintiff cannot maintain his cause of action without negating the exceptions, then the petition must be so framed as to show specifically that the party sued is not within such exceptions. But if plaintiff's right of action is complete under a statute, and there is a provision or exception either in that or some other statute which may be made available to defeat it, then the matter must be taken advantage of by way of defense.

*Appeal from Buchanan Circuit Court.*

The facts material to this case appear sufficiently in the opinion of the court.

*Wm. H. Sherman*, for plaintiffs in error.

I. Gen. Stat. 1865, p. 564, § 19, provides as follows: "Under an attachment the officer shall be authorized to seize as attachable property the defendant's account-books, accounts, notes, etc., \* \* \* \* \* as well as his other property, real, personal, and mixed, etc., \* \* \* but no property or wages declared by statute to be exempt from execution shall be attached, except in the case of a non-resident defendant, or a defendant who is about to move out of the State with intent to change his domicile." If the defendant in error bases his cause of action upon the exemption made by this section of the statute, he must show in his petition every fact which will bring his cause within it. Statutes of exemption are strictly construed. (Sedg. on Stat. &

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State of Missouri, to use of Ladd, v. Clark et al.

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Const. Law, pp. 344-6.) The exemption is the exception to the general rule of law which subjects the property of a judgment debtor to the payment of his debts, and he who claims such an exemption must affirmatively show the facts in his petition which warrant it. The petition should negative the exception contained in the clause which enacts the exemption. (Sedg. on Stat. & Const. Law, 62-3; 1 Chit. Plead. 256-7; Trustees *et al.* v. Utica & Sch. R.R. Co., 6 Barb. 313; Teel v. Fonda, 4 Johns. 304; Brutton v. State, 4 Ind. 601-2; Speers v. Parker, 1 T. R. 141; Thibault v. Gibson, 12 Mees. & W. 88; Vavasour v. Ormond, 6 B. & C. 430; Williams v. Hingham, 4 Pick. 341; Comm. v. Maxwell, 2 Pick. 139; Smith v. Moore, 6 Me. 240; State v. Gurney, 37 Me. 149; State v. Somers, 3 Verm. 156; State v. Barker, 18 Verm. 195; Bartlett v. Crozier, 17 Johns. 456.) An exception in the enacting clause of a statute must be negated by the pleader, but when the exception is in the nature of a proviso its provisions become matters for the defense. (Sedg. on Const. & St. Law, 62; State v. Miller, 24 Conn. 522; 1 Chit. on Crim. Law, 284-5.)

II. In all cases where, by the law of this State, any person is authorized to prosecute a suit to his own use on any official bond, he shall sue in the name of the State or other obligee named in the bond, stating in the process, pleadings, proceedings, etc., that the same is brought in the relation and to the use of the person so suing. (Gen. Stat. 1865, p. 605, § 15.) Where a remedy is sought under a statute, all of the requirements of the statute must be contained in the petition therefor. (Edmiston v. Edmiston, 2 Ohio, 392; 8 Ohio, 292-3; Hull v. State, 20 Ohio, 7; 1 Penn. St. 154; 38 *id.* 273; 7 Hill, 575; 7 Blackf. 556; 9 Shepley, Me., 541.) Now, though the "title" of plaintiff's petition states that "the State of Missouri to the use of Jacob B. Ladd" is plaintiff, the petition does not by allegations therein show that plaintiff is the relator in this case, or that this case is prosecuted for his use and benefit. (State to use of Tapley's Adm'r v. Matson, 38 Mo. 489.) The allegations in plaintiff's petition seem to suggest that this cause is prosecuted more especially by and for the State than for any injured relator.

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State of Missouri, to use of Ladd, v. Clark et al.

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The petition does not show that Ladd has any part or "hand" in the prosecution of this action.

*Bennett & Pike*, for defendant in error.

I. The suit is properly brought in the name of the State of Missouri, to the use of said Ladd, as plaintiff. See 35 Mo. 385, where the same objection was made and entirely disregarded by the Supreme Court.

II. It is not necessary to negative the exception in the clause upon which the action is founded, to-wit: the last part of § 19, p. 564, Gen. Stat. 1865. 1. Because the petition shows affirmatively that said Ladd was living, at the time of the seizure of said property, with his family in this county, thus in terms negating non-residence or attempted removal from the State. 2. After words of general prohibition in a statute or clause, an exception or proviso in the statute or clause need not be negated, but must be pleaded by the defendant. (24 Conn. 522; 5 Bacon's Abridg. 90, 91.) 3. Where the proviso or exception forms no part of plaintiff's title or cause of action, but merely furnishes excuse or defense for the defendant, it need not be negated, but must be set up by the defendant. (3 Johns. 438; 4 Johns. 304.)

WAGNER, Judge, delivered the opinion of the court.

The only question material to be noticed in this court is the sufficiency of the petition. There can be no doubt about the justice of the judgment; and if the plaintiff's petition contains the requisite and necessary averments, the judgment should be affirmed. The action was based on an official bond, given by the defendant Clark and others, and was conditioned that Clark should faithfully perform the duties of constable of Washington township in Buchanan county.

The breaches assigned were in substance that, before and at the time of committing of the grievances by the defendant Clark, the plaintiff Ladd was the head of a family consisting of his wife and several children, and was keeping house and living with his family in the said township of Washington; that Ladd was insolvent; that all the property of every kind and description that he owned

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or was possessed of consisted of household and kitchen furniture, then used by him in his housekeeping, and was necessary for his family; that said household and kitchen furniture was not worth the sum of \$300. Yet the said defendant Clark, well knowing that said goods and chattels were not liable to attachment, did, as constable of said township, by virtue of a writ of attachment issued by a justice of the peace, attach, levy upon, and sell, a portion of the furniture, etc. The petition then set out with sufficient particularity the goods attached, their value, the amount for which they were sold, and the damages resulting therefrom.

The attachment act declares what property the officer shall be authorized to seize as attachable, but expressly provides that no property or wages declared by statute to be exempt from execution shall be attached, except in the case of a non-resident defendant, or of a defendant who is about to move out of the State with intent to change his domicile. (Gen. Stat. 1865, p. 564, § 19.)

The statute under the title "Execution" exempts from levy and sale personal property of the value of \$300 when owned by the head of a family.

It is now insisted, and it is the principal ground relied upon by the plaintiffs in error, that the petition is fatally defective and sets out no cause of action, because it does not negative the exceptions contained in the nineteenth section of the attachment act and specifically declare that at the time of the attachment and levy the plaintiff was not a non-resident, nor was he about to remove out of the State with intent to change his domicile. There can be no difficulty with regard to the first exception, as the petition states explicitly that the plaintiff was residing at the time with his family in the said township of Washington. This, though not in the language of the statute, amounts to a substantial allegation that he was not a non-resident. As a general rule he who would entitle himself to an action upon a statute must allege all the facts upon which the statute grounds the action, and if he fails to do so in his petition he cannot have judgment. (Bartlett v. Crozier, 17 Johns. 456; Williams v. Hingham, 4 Pick. 341.) In both civil and penal actions enough must be stated in the

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State of Missouri, to use of Ladd, v. Clark et al.

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declaration, or must be necessarily inferable from what is stated, to show a perfect right of action. The law seems to have firmly settled a distinction between an exception in the purview of an act and a proviso.

In the case of *Spiers v. Parker*, 1 T. R. 141, Mr. Justice Ashurst said that "any man who will bring an action for a penalty on an act of Parliament must show himself entitled under the enacting clause; but if there be a subsequent exemption, that is a matter of defense, and the other party must show it to exempt himself from the penalty." Mr. Justice Butler said: "I do not know any case for a penalty on a statute where there is an exception in the enacting clause, that the plaintiff must not show that the party whom he sues is not within it." And it has been said that where an action is given by statute, and in another section or subsequent statute exceptions are enacted, the plaintiff need not take notice of these exceptions, but may leave it to the defendant to set them up in his defense. But where the exception or limitation is contained in the same section which gives the right of action, the plaintiff must negative the application of them to his ground of action. (4 Pick. 347.)

The more reasonable rule, however, is this: If the proviso furnishes matter of excuse for the defendant, it need not be negatived in the petition, but he must plead it. And in this view of the matter it makes no difference whether the proviso be contained in the enacting clause or be subsequently introduced in a distinct form. It is the nature of the exception, and not its location, which ought to govern. (*Sheldon v. Clark*, 1 Johns. 513; *Bennett v. Hurd*, 3 Johns. 438; *Teel v. Fonda et al.*, 4 Johns. 304.) Where in the same section of the statute that the right of action is given the exception is contained, and it clearly appears that the plaintiff cannot maintain his cause without negating the exceptions, then his declaration or petition must be framed in conformity with the rules above laid down. But if his right of action is complete under a statute, and there is a provision or exception either in that or some other statute which may be made available to defeat it, then the matter must be taken advantage of by way of defense.



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Hunter v. Whitehead.

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Now, the action in this case was brought under the chapter in the statute providing for bringing suits on penal bonds for an alleged trespass in taking and selling personal property exempt by law. Everything is stated necessary to give the plaintiff a cause of action, and the defendant should have pleaded the proviso or exception contained in the nineteenth section of the attachment act in his defense, if he desired to exonerate himself from liability.

We therefore see no error in the judgment of the District Court, and its judgment is affirmed. Judge Fagg concurs.

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JOHN HUNTER, Respondent, v. JAMES M. WHITEHEAD, Appellant.

1. *Partnership — Performance.*— Where the proposition to form a partnership for the purpose of buying and selling lands was accepted and acted upon, and the contract in all respects fully executed, it is too late to deny the existence of the contract or to complain of the manner in which it was entered into. After having received the full benefit of the transaction and availed himself of all the advantages arising from the services rendered by his copartner, a party ought not to be heard in an attempt to defeat a recovery by charging that such copartner had acted in bad faith with the parties of whom the land had been purchased.
2. *Partnership — What issues triable by the Court.*— Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.

*Appeal from Buchanan Circuit Court.*

*Ensworth*, for appellant.

I. The contract alleged in the petition to have been made by the parties is denied by the answer. Therefore it must be by the plaintiff established by written evidence. (*Wildbahn v. Roubidoux*, 11 Mo. 660, 661, and cases cited therein; *Claywater v. Tetherow*, 27 Mo. 241; *Hammond's Adm'r v. Cadwallader*, 29 Mo. 166; 5 Johns. Ch. 1.) The petition of plaintiff charges that the money arising from the sale exceeding the costs was held

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by defendant below in trust for himself and defendant, which is positively denied by defendant. If such a trust as that charged by the plaintiff could exist between the parties to this suit, it must be in writing, otherwise it is void; and it being denied by the defendant, the plaintiff must establish his right by legal testimony, and there is none legal in such cases except written. (See the above citations, also § 3 of statute of frauds and perjuries, Gen. Stat. 1865, p. 807.)

II. Transactions based on deceit and fraud are not encouraged by the aid of courts of chancery. (1 Mo. 12; 25 Mo. 166; 35 Mo. 409, and citations; 11 Serg. & R. 164; 19 Barb. 250; 26 *id.* 160, 163; 19 Wend. 293; 21 *id.* 171; Chitty on Cont. 680, and notes thereto; 2 Pet. 583; 4 *id.* 328.)

III. The court erred in refusing the plaintiff a trial by jury. This is a suit for the recovery of money had and received to the plaintiff's use, and is based upon contract, which is clearly a jury case. (Gen. Stat. 1865, p. 673, § 12; 5 Johns. 112, 14; 14 *id.* 304.)

*Woodson, Vories & Vories*, for appellant.

I. This case was not simply a proceeding to recover money or property, but was a proceeding to settle, adjust, and close up a partnership and reach a trust fund. If so, the court, and not a jury, was the proper and legally appointed tribunal to try it. (See sections of the practice act regulating trials, Gen. Stat. 1865, ch. 169, §§ 12, 13, p. 673.) The petition not only asked for a judgment for money, but asked that an account might be taken of all matters between said parties. (Conran v. Sellew, 28 Mo. 320; Morris v. Morris, 28 Mo. 117; Paul v. Chouteau *et al.*, 14 Mo. 580.) The closing up of copartnerships, the adjustment of the accounts of the partners, as well as the ascertainment and enforcement of trusts, have always been subjects of equitable jurisdiction. If the respondent in this cause could, under the old system of practice, have filed his bill in chancery, and sustained it there upon the grounds embraced in this petition, the court committed no error in refusing appellant's motion and demand of a jury to try the cause.

FAGG, Judge, delivered the opinion of the court.

This suit, tried and determined in the Buchanan Circuit Court, was brought upon an alleged contract between the parties, by which a partnership was formed for the purpose of buying and selling again a certain tract of land described in respondent's petition. The finding and judgment of that court being in favor of the respondent, the cause was taken to the Fifth District Court, where there was an affirmance of the judgment, and it now comes here by appeal. The allegations of the petition charge the existence of the partnership, the purchase and resale of the land, with a statement of the amount of profit realized in the transaction by the appellant, and an account is asked to be taken between the parties and judgment rendered for the share of respondent, being the one-half of the said profit. To strip the answer of all matters not directly pertinent to the issues thus tendered by the petition, the real questions for determination related only to the existence of a partnership and the amount for which the appellant should account. The voluminous record in this case has been examined with much care, for the purpose of ascertaining whether any just cause exists for disturbing the finding of the Circuit Court upon these points. The allegations of the petition appear to have been abundantly proved by all the evidence in the cause; and the averment in the answer that the respondent acted merely as the agent of appellant, and was to receive a part of the profits arising from the sale of the land as compensation for his services, seems to have been a mere afterthought, and is wholly unsupported by any witness. Whatever may be said in reference to the manner of consummating the agreement between these parties, it is clear that the proposition to form a partnership for the purpose stated was accepted and acted upon, and the contract in all respects fully executed. It is too late, therefore, for the appellant to deny the existence of the contract or to complain of the manner in which it was entered into. After having received the full benefit of this transaction, and availed himself of all the advantages arising from the services rendered by the respondent, the appellant ought not to be heard in an attempt to defeat the recovery of the

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respondent by charging that he had acted in bad faith with the parties of whom the land was purchased. No such question of fraudulent dealing can properly arise in this case.

The only remaining question to be examined is the refusal of the Circuit Court to permit the cause to be tried by a jury.

By section 12, chapter 169, of General Statutes 1865, it is provided that "an issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided." Then follows, in section 13, the provision that "every other issue must be tried by the court," coupled with the discretion to take the opinion of a jury upon any specific question of fact involved in the case. It cannot be said in this case that it was an action for the recovery of money only, or for any other specific objects contemplated by the twelfth section. The purpose here was simply to establish a partnership and to ascertain the amount of funds held by the appellant in trust for the firm of which he was a member.—(Bray v. Fletcher, 28 Mo. 129.) These questions belong properly to the chancellor, and nothing appears in the record that would seem to require that the opinion of a jury should have been taken.

The conclusion, therefore, is that the judgment of the District Court should be affirmed, which is done with the concurrence of Judge Wagner.

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JOHN WEISE, TO USE OF JOSEPH WALKER *et al.*, Plaintiff in Error, *v.* PHILIP GERNER, Defendant in Error.

1. *Parties to Actions—Who are real parties in interest.*—Where the lessee of certain real estate assigned to a third party his interest in the leasehold, he cannot bring an action in his own name to the use of the executors of the original lessor against the assignee of the leasehold. Under section 2, chapter 161, Gen. Stat. 1865, the action should be commenced by the executors in their own names.

*Error to Fifth District Court.*

Matthew M. Hughes, in his lifetime, for himself and as guardian of M. J. and M. A. Moore, minor heirs of D. B. Moore, on the

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11th of May, 1853, entered into and signed a certain contract with John Weise, by the terms of which said Hughes rented to said Weise, from date till May 1, 1861, a certain mill on Bee creek. Among other agreements, Weise covenanted to perform sundry repairs, specified in the agreement, upon the mill; to pay taxes, etc. Failing to commence work within the first six months, the other party was at liberty to annul the contract. Shortly after signing said contract, Weise took possession of the leased premises. Soon afterward he assigned his interest in the leasehold to Philip Gerner, defendant, who, in consideration of said assignment, undertook and promised to fulfill all the covenants and conditions embraced in said contract, in the room and stead of said Weise.

Hughes being dead, this action was brought by Weise to the use of his executors, Walker and others, against Gerner, for failure to comply with the covenants contained in the lease.

Other facts pertinent to the case appear sufficiently in the opinion of the court.

*Woodson, Vinyard & Young*, for plaintiff in error.

I. Weise had the right to bring the suit as he did. The contract was made with him by Gerner, and when Gerner violated the contract Weise had the undoubted right to maintain a suit against him, and whether he brought the suit for his own benefit or for the benefit of some one else is a matter that is of no earthly consequence to any one except Weise. If he was not a trustee of an express trust, the statement in the petition "to the use of Walker and Rixey" is at most surplusage, and does not vitiate the pleading; if wrong, it might upon motion have been stricken out. (*Beattie v. Lett*, 28 Mo. 596; *Webb v. Morgan*, 14 Mo. 428.)

*John Doniphan*, for defendant in error.

I. There was no interest in Weise which authorized him to sue. Suit must be brought by the parties in interest. (Gen. Stat. 1865, p. 651, § 2.) Weise was not the party in interest as plaintiff, and could not be until he had suffered a recovery against him or had been rendered liable by action on the part of



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the lessor. If Weise assigned his lease to Gerner by consent of Hughes, Weise was relieved of all further liability, and had no interest, and cannot maintain suit.

FAGG, Judge, delivered the opinion of the court.

This suit was commenced in the Platte Circuit Court, where there was a verdict and judgment for the plaintiff. An appeal was taken to the Fifth District Court, where the judgment was reversed and the cause remanded. The case now comes to this court upon a writ of error, prosecuted by the plaintiff below. If it were necessary to review the entire proceedings in the Circuit Court for the purpose of correcting all the errors manifest upon the face of the record, there would be no difficulty in pointing out many objections that ought not to be permitted to stand. That which goes to the root of the whole case, however, and is sufficient to defeat any recovery by the plaintiff, is all that need be considered. The petition discloses the fact that the suit was instituted to recover damages for a failure on the part of Gerner, the assignee of Weise, to comply with the covenants contained in a lease of certain property by the testator Hughes to Weise.

The answer of Gerner denies the right of the plaintiff to bring the suit to the use of the executors of Hughes; alleges the death of Weise, as well as the fact that the real parties in interest were not made parties plaintiff; and pleads to the merits of the action by averring a compliance in all respects with the terms and obligations of the lease. The question as to the proper parties to the suit was also raised by motion in arrest of judgment. The written lease which is alleged to have been transferred by assignment to the defendant Gerner is set out in full in the petition. The lessor, M. M. Hughes, deceased, executed the same for himself, and also as guardian for certain minors therein named, who were joint owners of the property with him. The petition does not show that the interest of these minors in the property in question had ever been extinguished. They must, therefore, be considered necessary parties in any suit growing out of this transaction. The provisions of the statute on this subject

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are plain and simple. (Gen. Stat. 1865, chap. 161, § 2.) It is manifest upon the facts stated that if any cause of action had accrued against the defendant Gerner, it ought to have been brought in the names of the executors themselves, joined with such other persons as could be shown to have an interest directly in the recovery sought for. They alone are to be considered as the real parties in interest within the meaning of the statute, and the action should have been prosecuted in their names only.

Weise, having assigned the lease and thereby transferred his entire term to Gerner, had no interest in the matter such as to authorize him to institute this suit. There are no facts stated in the petition that would authorize a recovery in his own right against the defendant, and much less in his name to the use of the real parties in interest or any of them.

With the concurrence of Judge Wagner, the judgment of the District Court will be affirmed and the cause remanded to the Circuit Court.

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STATE OF MISSOURI, TO USE OF WORTH COUNTY, Appellant, v.  
JOHN PATTON *et al.*, Respondents.

1. *Pleading — Averments.*— Where enough appears in the body of the petition to show the object of the suit and the real party for whose use and benefit it was prosecuted, it substantially complies with the rules of pleading (Gen. Stat. 1865, p. 658, § 3) as recognized by the former decisions of this court.
2. *Pleading — Title.*— The want of a proper statement of the parties in the caption of the petition is not fatal when it is supplied in the body of the pleading by a substantial averment showing the capacity of the plaintiff to sue and recover upon the cause of action.

*Appeal from Worth Circuit Court.*

Plaintiff's petition was as follows: "The State, to the use of Worth county, against John Patton, John A. Fanning, F. M. Bowlin, James E. Cadle, Laban G. Janes, Daniel Cox, Elias G. Weigart, and Eli Smith. In the Circuit Court for Worth county, April term, 1866. Now comes the plaintiff, by her attorney, who prosecutes this cause in the name and relation of the State

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of Missouri to the use of Worth county, and for this her second amended petition states: That John Patton, on the 28th day of March, A. D. 1861, was sheriff of Worth county, in the State of Missouri, and *ex-officio* collector of the revenue of said county; and that the said John Patton, as collector of the revenue of said county of Worth, on the 28th day of March, A. D. 1861, executed his official bond as said collector to the said State of Missouri."

The petition then recites the substance of the bond, and proceeds as follows: "Plaintiff further states that said Patton, as collector for the county of Worth, received the tax-books for the year 1862, for said county of Worth, and was charged with the amount of \$1,549.57 taxes thereon; and that said Patton, as collector of the revenue of said county, between the 28th day of March, 1861, and May the 1st, 1862, collected on said tax-book the State and county revenue of said county, to the amount of \$337.36, as shown by a settlement with the County Court of said county, by his deputy, F. M. Bowlin, at the June term of said court, 1862; also, the sum of \$70 collected on dramshop licenses, and ——— dollars on merchants' licenses, said sums not in said settlement, amounting in all to the sum of \$407.36 collected of the State and county revenue on said tax-book more than he, the said John Patton, collector as aforesaid, has paid over to said State and county or otherwise accounted for; and that the said Patton, as collector of said county, has wholly failed to punctually pay over or account for the sum of \$407.36 revenue collected by him and now due the plaintiff, according to the obligations of his said bond as said collector, by reason whereof said plaintiff says she is damaged to the amount of five hundred dollars; wherefore plaintiff prays judgment, etc."

*Asper & Collins*, for appellant.

I. The second and third points in the demurrer raise the objection that the form of the suit, as to parties, is not sufficient, because it does not state that the suit is brought "at the relation and for the use of Worth county." This is stated in the body of the petition, and is sufficient. (*Harney v. Dutcher*, 15 Mo. 91; *Duncan v. Duncan*, 19 Mo. 369; *Myers v. Christy*, 21 Mo. 112;

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Gen. Stat. 1865, p 605, § 15.) The caption of the suit is immaterial, provided the parties are properly stated in the body of the petition. (*Beattie v. Lett*, 28 Mo. 596.) If it appears in the petition who the relator or beneficiary is, it is sufficient. (State to use of *Young v. Hesselmeyer*, 34 Mo. 76; State to use of *J. D. Tapley's Adm'r v. Matson*, 38 Mo. 489; State to use of *Dehaven et al. v. Davis*, 35 Mo. 406.) The character in which plaintiff sues is traversable—made so in this case. (1 Smith's Pr. 367.)

II. All that part of the petition which relates to State revenue could have been stricken out on motion, but cannot be reached on general demurrer. It must be regarded as mere surplusage. (*Garner v. H. & St. Jo. R.R. Co.*, 34 Mo. 235; 1 Van Sand. Pl. 174, 366, 369, 371; 1 Chit. Pl. 229; 1 Smith's Pr. 365-6.) A demurrer is proper only when an entire pleading is defective; here a good breach is assigned, and therefore it is no ground of demurrer. (2 Sandf. 702; 6 How. Pr. 365; *Peabody v. Washington Ins. Co.*, 20 Barb. 342; 17 How. Pr. 57; *Butler v. Wood*, 10 How. Pr. 222; State to use, etc., v. *Cameron*, 12 Mo. 378; State to use, etc., v. *Davis*, 35 Mo. 406.)

*Ensworth*, for respondents.

I. The defendant is charged with collections on tax-book for 1862, between the 28th of March, 1861, and 1st of May, 1862. Sess. Acts of 1860-61, title "Revenue," p. 69, §§ 42, 47, show that the tax-book of 1862 could not come into the collector's hands until May 1st, 1862, and the tax for that year could not have been levied at the time stated in the petition.

II. The petition does not show what State it is that sues. The averment in the body of the petition, that it is the State of Missouri, is not in compliance with the statute regulating practice in courts. § 3 Gen. Stat. 1865, chap. 165, p. 658, says: The title must of itself show the parties. If judgment had been rendered upon the petition for plaintiff, it could not be sustained, although the court might overrule the demurrer. (27 Mo. 167; 30 Mo. 142, 144.)

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State of Missouri, to use of Worth Co., v. Patton et al.

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FAGG, Judge, delivered the opinion of the court.

This suit was instituted in the Circuit Court of Worth county, against the respondents, upon the official bond of John Patton, collector of that county, for a failure to pay over certain moneys collected by him, and which belonged to the county as a part of its revenue. The cause was determined in the Circuit Court upon a demurrer to the petition, and thence taken by appeal to the Fifth District Court, where the judgment was affirmed, and it now comes here by appeal.

Passing over any question that might arise upon the form of the judgment rendered by the Circuit Court, we proceed to consider directly the points raised by the demurrer.

Three causes of demurrer are assigned. 1. That the facts set out did not constitute a cause of action; and the other two being substantially the same, and referring to the form of the suit by alleging that there was a defect of parties. The petition, after setting out the bond, proceeds to charge the collector Patton with the collection of a certain amount of money belonging both to the State and county revenue, between the dates of March 28, 1861, and the 1st day of May, 1862, "as shown by a settlement with the County Court of said county" at the June term following. Now, evidently the material part of this allegation is that so much of the revenue with which he ought to be charged for that year had actually been received by him before the date of his settlement, and the discrepancy between the dates stated and the time fixed by law for the delivery of the books to him is a matter of no great consequence. The substantial part of the averment is that this amount of money was in his hands, as shown by his own settlement. The further averments in the petition show that this amount, together with others received upon different accounts, made up a sum of \$407.16, which he had wholly failed to pay over or account for in the manner required by law, and that the said sum was then due the plaintiff. This certainly is the statement of a cause of action. It is admitted that so much of the statement as referred to revenue belonging to the State was improperly incorporated in the petition. Enough appears in the



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Buchanan Co. v. Kirtley et al.

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body of it to show the object of the suit, as well as the real party for whose use and benefit it was prosecuted. This is a substantial compliance with the rules of pleading as recognized by the former decisions of this court. (*State v. Matson*, 38 Mo. 489.) There is much in the petition that ought to have been treated as mere surplusage, but the proper steps were not taken to reach such an objection. The want of a proper statement of the parties in the caption of the petition is not fatal where it is supplied in the body of the pleading by a substantial averment showing the capacity of the plaintiff to sue and recover upon the cause of action stated. (See authorities above cited.)

The judgment of the District Court will therefore be reversed and the cause remanded to the Circuit Court of Worth county for further trial. Judge Wagner concurs.

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BUCHANAN COUNTY, Appellant, *v.* E. B. KIRTLEY *et al.*, Respondents.

1. *Bridges — Covenants to repair — Actions.*—Where a party entered into a bond obligating himself to build a certain bridge, and guaranteeing that the same should stand and remain for four years, and subsequently within that period said bridge got so out of repair as to be unsafe, his sureties became liable to an action for breach of covenants contained in said bond, even though the builder and his sureties on the bond had no written notice stating the repairs necessary to be made and requiring the same to be done. Sections 16 and 17, p. 326, R. C. 1855 (Gen. Stat. 1865, §§ 17, 18, p. 299) afford a cumulative remedy, wholly independent and distinct from an action on the bond. The bond contained an express covenant, and no written notice was required to the undertakers or their securities to hold them responsible on their obligation. Their stipulations bound them to fulfill their engagements, and any breach that accrued they were required to take notice of.
2. *Pleadings — Allegations.*—An allegation of notice in plaintiff's petition was immaterial, and should have been treated as surplusage.

*Appeal from Buchanan Circuit Court.*

*Ensworth & Hill*, for appellant.

I. The allegation in the petition of notice having been given to the defendants of the bridge's failing is surplusage. No

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notice was necessary to defendants. (10 Mo. 667-8; Statutes 1840, p. 107, §§ 13, 14; R. C. 1855, pp. 326-7, §§ 16, 17; Gen. Stat. 1865, §§ 16, 17.)

*Woodson, Vories & Vories*, for respondents.

I. The first question presented by the record is whether the court erred in striking from the deposition of P. K. O'Donnell the words, "I notified the defendants of the condition of the bridge before the repairs were made." The petition is based upon the sixteenth and seventeenth sections of an act "to provide for building bridges." (R. C. 1855, vol. 1, pp. 326-7.) The court did not err in striking out that part of said deposition. (*Gathwright v. Callaway County et al.*, 10 Mo. 663-8.)

II. The suit is not founded upon the bond, but upon the statutory provisions giving a remedy for failing to repair in accordance with said sixteenth and seventeenth sections aforesaid. The petition avers notice by the commissioner of the county; a failure to repair after such reasonable notice; the repairing of said bridge by said plaintiff; the cost of same; praying for judgment for the amount so expended for said repairs. The county abandoned her remedy on the bond, and sued for money expended in repairing said bridge, and, as such action was given by the statute, plaintiff is compelled to show that she has pursued its terms in order to maintain her action.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought in the Circuit Court by the plaintiff against the defendants, upon a bond executed by one Hugh Irwin in his lifetime, obligating himself to build a bridge in the county of Buchanan, according to certain plans and specifications, and providing that the said bridge should stand and remain for four years. The defendants were sureties on the bond. By contract the bridge was to be completed on or before the 10th day of June, 1858. The breach assigned is, that soon after the said bridge was completed the same began to give way, and was, by the spring of 1860, so far gone that the same was entirely unfit and unsafe—of all which the defendants had due and legal and

timely notice through the commissioner of plaintiff duly appointed. The petition then states that, after waiting a reasonable length of time, plaintiff proceeded to make the necessary repairs, and that defendants were liable for the same under their bond.

The answer contains a denial of every material averment set forth in the petition, except the execution of the bond, which is admitted. Upon the trial the plaintiff offered to read in evidence the deposition of O'Donnell, who acted as road commissioner for the county in letting out the contract for the construction of the bridge. The following portion of the deposition was objected to—"I notified the defendants of the condition of the bridge before the repairs were made"—because the law requires a written notice to be given to the defendant specifying what repairs were required to be made, and that the deposition did not disclose that such written notice was given. The objection was sustained and that part of the deposition ruled out. Plaintiff's counsel then stated that he had no evidence to offer as to any written notice being given to defendants, or any notice specifying what repairs were to be made on the bridge, before plaintiff made the repairs charged in the petition.

Plaintiff then offered to prove by witnesses the condition of the bridge and the necessity of repairing the same, but the court suggested that, if plaintiff had no evidence of a written notice, further testimony would be useless, as the whole case would turn upon the question of a written notice under the statute; whereupon, plaintiff having no other evidence of a notice in writing, took a non-suit, and afterward moved to set the same aside, which motion being overruled, the cause is brought here by appeal.

If this proceeding had been instituted on the sections of the statute to recover the amount expended in the necessary repairs of the bridge, there is no doubt that a strict compliance with the statutory requirements in regard to giving written notice would have been indispensable as a condition precedent to the plaintiff's right of recovery.

By R. C. 1855, p. 326, § 16, it is provided that if any bridge requires repairing, which by contract is to be kept in repair, the commissioner of such bridge, or other person appointed by the

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Fuggle, Adm'r of Weldon, v. Hobbs.

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County Court, shall give notice in writing to any one or more of the undertakers, or to his or their securities, stating the repairs necessary to be made, and requiring the same to be done within a reasonable time, to be set forth in such notice. By section 17, if the repairs shall not be made within such time, the commissioner shall employ some other person forthwith to make the same, allowing therefor a reasonable price, and may immediately collect the amount paid, with costs, before any court of competent jurisdiction.

The statute here gives a remedy, by a proceeding instituted by the commissioner, and prescribes the forms and requisite steps necessary to be taken in such cases. But this is a cumulative remedy, wholly independent and distinct from an action on the bond. The bond covenanted that the bridge should stand and remain for four years; and if it did not do so, a breach took place, and a right of action accrued to the obligee. It was an express covenant, and no notice was required to the undertakers or their securities to hold them responsible on their obligation. Their stipulations bound them to fulfill their engagements, and any breach that accrued they were required to take notice of. (*Gathwright v. Callaway county*, 10 Mo. 663.)

The allegation of notice in the petition was immaterial, and should have been treated as surplusage, as the action was exclusively predicated upon the bond of the defendants.

Reversed and remanded. Judge Fagg concurs.

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THOMAS R. FUGGLE, Adm'r of BENEDICK WELDON, Respondent,  
v. WILLIAM R. HOBBS, Appellant.

1. *Pleading—Demurrer, objections raised by.*—The objection that plaintiff's petition does not state facts sufficient to warrant the plaintiff to sue, because his representative character is not sufficiently set out and averred, should be raised by demurrer. Otherwise, under the present system of pleading, it will be presumed to be waived. (Gen Stat. 1865, p. 658, §§ 6, 10.)
2. *Pleading—Executorship—What averment of sufficient.*—Where, in the body of the petition, it is averred that plaintiff is the acting and lawful executor of the last will and testament of the deceased, the averment is amply good, in

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Fuggle, Adm'r of Weldon, v. Hobbs.

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the absence of any objection, to sustain the cause, within the reasoning of the decision in the case of *The State to the use of Tapley's Adm'r v. Matson*, 38 Mo. 489.

3. *Pleading—Title.*—The description of administrator in the title may be wholly disregarded.
4. *Pleading—Exceptions—Answer.*—If defendant wishes to avail himself of the error committed by the court in striking out his answer, he should let judgment go at the time and stand upon his exceptions. By pleading over and going to trial upon another issue, he voluntarily abandons whatever grounds he might have had for a review of the action of the court.

*Appeal from Davies County Court.*

*McFerran*, for appellant.

I. The Circuit Court erred in striking out appellant's answer to respondent's petition. (Gen. Stat. 1865, p. 659, § 12; *id.* p. 677, § 45; *Yallaly v. Yallaly*, 39 Mo. 493; *State ex rel. Oddle v. Sherman*, *ante*, 210.)

II. The answer stricken out by the Circuit Court is a part of the record proper in the cause; and the amended answer subsequently filed by leave of the Circuit Court, containing a distinct defense not included in the answer stricken out, does not waive the error of the court committed in striking out said answer. (*Bateson v. Clark et al.*, 37 Mo. 31; *Normandser v. Hitchcock*, 40 Mo. 178; *State to the use of Tapley's Adm'r v. Matson et al.*, 38 Mo. 489.)

III. The errors of record are not cured by the verdict. (*Jones v. Louderman*, 39 Mo. 287.)

IV. The petition is not sufficient in law to support the judgment in this. It does not aver the death of Weldon, nor the appointment or qualification of the plaintiff as the executor of the said Weldon. (*State to the use, etc., v. Matson*, 38 Mo. 489.)

*Vories & Vories*, for respondent.

I. The appellant insists that the petition does not aver the representative character of the plaintiff so as to authorize him to sue. 1. The objection taken, if objection at all, should only have been taken by demurrer. The objection goes to the parties and is waived by the answer. (Gen. Stat. 1865, p. 658, §§ 6, 10.)



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Fuggle, Adm'r of Weldon, v. Hobbs.

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2. Neither the motion for a new trial nor the motion in arrest of judgment makes any objection to the sufficiency of the amended petition, nor in any manner complains of the sufficiency thereof; it is, therefore, too late to bring up that objection for the first time in the District Court. It is admitted that if the petition failed to "state facts sufficient to constitute a cause of action," the defendant might make the objection by motion in arrest; but in this case the motion in arrest makes no objection to the petition. This has been twice waived; first by not demurring, and second by not setting up the objection in the motion in arrest or in the motion for a new trial. 3. The petition is sufficient. After setting forth the agreement, it states that the defendant has not paid the money either to the deceased or to the plaintiff, who is now the acting and lawful executor of the last will and testament of Weldon, deceased. It makes no difference that the plaintiff, in the caption of his petition, styles himself administrator, etc. The averments in the body of the petition are good and will prevail. It was not necessary for the plaintiff to show by what authority he was made executor, etc.; the allegations as they stand are good after verdict. (*Higgins v. H. & St. Jo. R.R. Co.*, 36 Mo. 431; *Duncan v. Duncan*, 19 Mo. 368.)

II. The appellant having at once obtained leave to file, and having filed, an amended answer upon which a trial was had, the appellant by this action waived his first action, and the same in contemplation of law was withdrawn. (*Sweeny v. Willing*, 6 Mo. 174; *Barada v. Inhabitants of Carondelet*, 8 Mo. 644; *McCullum v. Lougan's Adm'r*, 29 Mo. 451.)

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted in the Davies Circuit Court to recover an amount alleged to be due from the defendant to the plaintiff's testator.

The foundation of the suit was an agreement entered into in writing between the testator Weldon, in his lifetime, and the defendant Hobbs, whereby it was stipulated that Weldon assumed the payment of \$787.50 to one Hamblin in part payment for a certain steam-mill formerly owned by Hamblin & Weldon, and

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then owned (at the date of the agreement) by Weldon & Hobbs, Hobbs agreeing that Weldon should have a lien on the mill till the amount was paid, specifying the length of time for which credit was to be given.

In the title to the petition the plaintiff is described as the administrator of Weldon, deceased, but in the body of the petition it is averred that he is the acting and lawful executor of the last will and testament of the deceased. There is no other allegation of his appointment, qualification, or representative capacity. The defendant filed an amended answer in which he did not controvert, deny, or in any way notice, the character in which plaintiff sued, but he set up other matters in defense to the action. This answer was, on motion of plaintiff's counsel, stricken out, because it was indefinite, uncertain, and inconsistent. To which action of the court in striking out said answer, the defendant at the time excepted. Defendant then filed his second amended answer, in which the only defense set up was a want of consideration to support the agreement sued on, and went to trial solely upon that issue.

The jury, after hearing the evidence, returned a verdict for the plaintiff, and judgment was rendered thereon. Defendant, after an unsuccessful effort to obtain a new trial and arrest the judgment, carried the case to the Fifth District Court, where the judgment was affirmed by a divided court, and it now comes here on appeal.

The counsel for the appellant has raised many points, but the real and substantial merits of the case may be limited to a small compass. It is objected that the petition does not state facts sufficient to warrant the plaintiff to sue, because his representative character is not sufficiently set out and averred. This objection is raised here for the first time, and does not appear to have been taken at all in the court below. It is not included either in the motion for a new trial or in arrest of judgment. Under our system of pleading the defendant must be conclusively presumed to have waived it. If there was any defect, it was apparent on the face of the petition, and furnished ground for demurrer (Gen. Stat. 1865, p. 658, § 6); and when he failed to resort to a demurrer it must be construed into a waiver. (*Id.* § 10.)

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Fuggle, Adm'r of Weldon, v. Hobbs.

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The averment contained in the petition is amply good, in the absence of any objection, to sustain the cause, within the reasoning of the decision in the case of *The State to the use of Tapley's Adm'r v. Matson*, 38 Mo. 489. The description of administrator in the title may be wholly disregarded.

It is further argued that the court erred in striking out the first amended answer. If this should be conceded, the appellant is in no condition to take advantage of it. We have examined the answer stricken out, and, while much of it is liable to the objections urged against it in the motion, we are of the opinion that there were some denials and matters stated in it which were well pleaded. But if the appellant intended to avail himself of the errors committed by the court in this respect, he should have let judgment go at the time and stood on his exceptions. By pleading over and going to trial on another issue, he voluntarily abandoned whatever grounds he might have had for a review of the action of the court.

The judgment appealed from is the judgment rendered upon the issue tendered by the last answer, and on which the case was tried; and should the case be reversed and sent back, it could only be for errors committed at the trial on the issues as tendered and framed by the parties.

It is superfluous to go into an inquiry in regard to the consideration of the agreement, as all the evidence in that behalf was submitted by defendant (appellant here), and of course he cannot be heard to complain of it.

So far from there being no evidence, as contended, to sustain the verdict, the evidence is most cogent and conclusive, and the jury would not have been warranted in finding any other or different way. Entertaining these views, we have been unable to find any error in the action of the court in giving or refusing instructions.

Judgment affirmed. Judge Fagg concurs.

[END OF AUGUST TERM.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
OCTOBER TERM, 1868, AT ST. LOUIS.

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BLAKE SIMPSON, Plaintiff in Error, *v.* THOMAS H. BLUNT,  
Defendant in Error.

1. *Practice — Submission of Cause — Finding — Continuance.*—Where, upon the trial of a cause, the court found that plaintiff was not entitled to recover on the proof given, and, without entering judgment of record, continued the cause, such action was simply an exercise of the power of the court to grant a new trial; and this court will not review its action in granting the same.
2. *Sureties — Notice to Sue — Waiver.*—Where the surety upon a note gave the holder notice in writing to bring suit immediately, but delay was caused by defendant himself, he is presumed to have waived the requirements of the statute concerning the time within which such suits are to be brought. (Gen. Stat. 1865, p. 406, §§ 1, 2.)

*Error to Second District Court.*

*Van Allen*, for plaintiff in error.

I. A writ of error only lies upon a final judgment. (Long v. Towl, 41 Mo. 398, and cases cited.) There was no final judgment in this case until after the second trial. The defendant, in order to avail himself of the error, if such there was, in the action

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Simpson v. Blunt.

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of the court in allowing the withdrawal of submission, or granting a new trial, which is all the same, should have abandoned the case and sought redress before there was a second trial on the merits. (Helm v. Bassett, 9 Mo. 51; Keating v. Bradford, 25 Mo. 86; 41 Mo. 517.)

II. Blunt had the right to avail himself of the statute, or to waive its provision, as he did in the case at bar. (Wilson v. Huston, 13 Mo. 146; Airey v. Pearson, 37 Mo. 424; Hoffman v. Hulbert, 13 Wend. 377; Union Bk. v. Hyde, 6 Wheat. 572; Edw. on Bills and Notes, 611; Story on Notes, p. 653, § 486; 1 Greenl. Ev. p. 408, § 304, 6th ed.)

*Wingo, Rolf & Bush*, for defendant in error.

I. The verbal suggestions of Blunt, the surety at the time of serving the notice, were of no force to "countermand, waive, or qualify" the notice or the operation of the statute, and were not an excuse for the failure of plaintiff to commence his action. On the giving of the notice in writing, the statute left the rights and liabilities of plaintiff and Blunt to rest altogether on the writing; and plaintiff's delay to commence his action for more than thirty days after service of the notice was a complete release of Blunt and an absolute extinguishment of his liability under the statute. (Gen. Stat. 1865, p. 406, chap. 92, §§ 1-3; Cockrill v. Dye, 33 Mo. 365; Routon v. Lacy, 17 Mo. 399; Freligh v. Ames, 31 Mo. 253.)

II. The action of the Circuit Court giving plaintiff leave to withdraw his submission, and the benefit of a new trial, was without precedent or authority. Plaintiff, at that stage of the proceedings, had no right to take a non-suit, much less to withdraw his submission. (Hageman v. Moreland, 33 Mo. 86; *id.* 374; Gentry Co. v. Black & Seat, 32 Mo. 542.)

III. The former notice and laches of plaintiff operating a release of Blunt, the latter notice was not a waiver or revocation thereof, nor a new promise binding on Blunt without a consideration. (Robertson v. Findley, 31 Mo. 384; Cook v. Elliot, 34 Mo. 386.)



BAKER, Judge, delivered the opinion of the court.

This suit was brought on a note for \$650, in which the defendant was security for G. C. Wingo. On the 11th day of March, 1864, the defendant gave plaintiff notice in writing requiring him to bring suit on the note without delay, in accordance with the provisions of the statute relating to securities. This suit was commenced over two years after the notice was given. The plaintiff claims that the defendant waived all rights acquired by him by virtue of the notice. The case was submitted to the court without a jury, and the court decided that the plaintiff was not entitled to recover on the proof given, and, without entering judgment of record, continued the case and permitted the plaintiff to amend his petition. At a subsequent term the cause was again tried by the court, without a jury, and a judgment rendered in favor of the plaintiff for the amount of the note and interest, from which the defendant appealed to the Second District Court, where the judgment of the Circuit Court was reversed. The leading grounds of objection to the rulings of the Circuit Court, urged here, are: first, the refusal of that court to enter judgment for the defendant on the finding at the first trial, and the granting of a new trial to the plaintiff; second, rendering judgment against the defendant at the second trial on the evidence given. The first objection is easily disposed of. The action of the court at the first trial was simply an exercise of the power of the court to grant a new trial. This court has repeatedly decided that error will not lie from an order granting a new trial. It will not review the action of the Circuit Court granting the same. (9 Mo. 53; 25 Mo. 87; 41 Mo. 517.)

The evidence was sufficient to warrant the Circuit Court in finding that the defendant had waived all rights acquired by his first notice to sue. He requested the plaintiff, at the time the notice was served, to see the principal in the note before suing it, and induce him to pay part or all of the money if possible. He agreed with the principal afterward to remain security, and gave the plaintiff notice in writing that he need not sue on the note and he would continue security on it. Two years after this,

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Long et al. v. Towl.

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defendant again notified the plaintiff to bring suit on the note, and within thirty days thereafter this suit was instituted. The second notice in which the defendant requested the plaintiff not to bring suit was given after the expiration of thirty days from the date of the first notice. But both parties treated it as a waiver of the first. The delay of two years was caused by the defendant. It would be highly unjust to permit him to avoid the payment of the note in consequence of a delay caused by himself.

There seem to be no well-founded objections to the rulings of the court on the admission of evidence and the giving and refusing instructions.

The judgment of the District Court is reversed. The other judges concur.

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WILLIAM LONG and JAMES LONG, Plaintiffs in Error, v. GEORGE TOWL, Defendant in Error.

1. *Contracts in restraint of trade, when void.*—A contract prohibiting one of the parties from carrying on any specific trade or business, having no reasonable limitations as to time or place, is void. The prohibition which extends any further than will fully protect the party for whose benefit the contract is made, in his occupation or business, is an unreasonable restraint of trade, and will render the contract void. But a contract which does not prohibit the defendant from carrying on the business designated at any place he may choose, but only limits the manner of carrying it on, by fixing the prices at which he may buy and sell, and the persons to whom he may sell, is not a restriction of trade according to any proper construction of the rule.
2. *Contracts — Consideration — Dismissal of Suits.*—The dismissal of suits palpably unjust forms no adequate consideration for a promise.
3. *Contracts — Bonds — Measure of Damages — Penalties.*—Defendant agreed with plaintiffs not to pay for ore taken from plaintiffs' land or elsewhere more than plaintiffs were paying, and to sell all ore purchased by him to plaintiffs, for which he was to receive four dollars per thousand pounds more than plaintiffs were then paying to the miners on their own land; and bound himself in a certain sum, "as liquidated damages," to be paid in case of a violation of or failure to perform any of such stipulations. Such a sum was held to be a penalty. Where an agreement secures the performance or omission of various acts, which are not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely. (*Baye v. Ambrose*, 28 Mo. 39, cited and affirmed.)

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Long et al. v. Towl.

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*Error to Second District Court.*

*Perryman & Dining, and Garesche & Mead, with Wingo & Rolfe, for plaintiffs in error.*

I. The dismissal of the suit was a sufficient consideration. (Mullanphy v. Reilly, 10 Mo. 489; Livingston v. Dugan, 20 Mo. 102; Stephens v. Spiers, 25 Mo. 390.)

II. Restraint of trade where limited, not general, is legal. (1 Story on Cont. § 552; Chitty on Cont. 520; 2 Pars. on Cont. 751, note *a*; Billings v. Ames, 32 Mo. 273.) As the proprietors of mines take so much toll by way of payment for the ore dug on their lands, the provisions of the contract as to the ore dug from plaintiffs' land were but a fair protection to them, and therefore legal. If valid in part, then the contract must be upheld. (Smith on Cont. p. 212, § 130, note *a*; Presbury v. Bennett, 18 Mo. 51.)

III. The five hundred dollars damages are stipulated damages. (Slosson v. Beadle, 7 Johns. 72; Hasbrouck v. Tappen, 15 Johns. 200; Grey v. Crosby, 18 Johns. 219; 2 Story's Eq. Jur. § 1318; Sedg. on Dam., 3d ed., § 421, pp. 441-2; Hammer v. Breidenbach, 31 Mo. 52.)

*Van Allen, for defendant in error.*

I. The consideration for making said contract, as stated in the petition—to-wit: "that plaintiffs would dismiss the said several suits"—not being set out as founded on any just claims, is not shown to be a valuable one.

II. The facts stated in the petition are not sufficient to constitute a cause of action, as they show a void contract—one by which an attempt is made to create a monopoly in restraint of trade, contrary to public policy. The plaintiffs in their petition aver that defendant in said contract bound himself not to "pay for mineral or lead ore dug or taken from the lands under the control and in the possession of plaintiffs, more or greater sum or price for the same than the plaintiffs should be at that time paying for mineral or lead ore;" and again, the defendant further agreed

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Long et al. v. Towl.

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that from and after the date of said contract he would not "pay any more or greater price for mineral or lead ore which he might buy than the plaintiffs are or should be paying for the same"—which mineral they aver he agreed to sell again to plaintiffs, they agreeing to pay him four dollars per thousand pounds more than they were paying miners and others. There is no limit as to the time or place of the prohibition. There is no limit as to price to be paid; that is, he shall pay "four dollars per thousand pounds" less than its value, and plaintiffs are to fix the market value to others, and pay Towl four dollars more than they pay to miners or others.

III. The object the plaintiffs had in view was to bring down and control the price of lead ore in that market. The reduction of the price of lead ore in the mining districts of this State by a monopoly such as was here attempted is a matter of public concern. Competition is the life of trade; whatever destroys or even relaxes competition in the trade is injurious if not fatal to it. (Chitty on Cont., 8th ed., pp. 576-7; Story on Cont. p. 579, §§ 550, 554; People v. Fisher, 14 Wend. 9; Chappel v. Brockway, 21 Wend. 158-165; Noble v. Boles, 7 Cowen, 307.) The law will tolerate no contract which, upon its face, goes to prevent an individual, for any time, however short, from rendering his services to the public in any employment he may choose, nor tolerate a contract which deprives any section of the country of the accommodations he might furnish. (Lawrence v. Kidder, 10 Barb. 641; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434.) All contracts and agreements which have for their object anything repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void; and whenever a contract or agreement is entered into with a view to contravene any of these general principles, there is no form of words, however artfully introduced or written, which can prevent courts of law and equity from investigating the truth of the transactions. (1 Story's Eq. 296; 4 Hill, 424; 4 N. Y. 449; 7 N. Y. 176; 16 Johns. 486; 40 Mo. 532.) In the case of Presbury v. Fisher *et al.*, 18 Mo. 50, the court says that "where the condition of a bond is entire, and the

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whole be against law, it is void ;” but adds, “ where the conditions consist of several different parts, and some of them are lawful and others not, it is good for so much as is lawful and void for the rest.” In this case Long’s claim upon the bond was an entirety, and it is not for the court to analyze that which the parties claim upon as a whole. There is no allegation in the petition of special damages. None could be given, as the five hundred dollars, claimed as a penalty, is not the measure of damages, and could not be recovered. (Story on Cont. p. 1125, § 1020; 2 Greenl. Ev. p. 265, § 258; 8 Mo. 467; Basye v. Ambrose, 28 Mo. 39; Hammer v. Breidenbach, 31 Mo. 49.)

BAKER, Judge, delivered the opinion of the court.

Previous to the execution of the instrument on which this suit was brought, the plaintiffs were in possession of a tract of mineral land in Washington county, from which a number of miners were engaged in taking lead ore under an agreement to sell the ore to the plaintiffs. In violation of their agreement, some of the miners sold ore taken from the plaintiffs’ land to the defendant. The plaintiffs instituted several suits before a justice of the peace against the defendant for purchasing ore thus taken from their land, which were pending when the agreement sued on was entered into. By this instrument the plaintiffs agreed to dismiss these suits. The defendant agreed on his part that he would not pay for ore he might thereafter purchase, taken from the plaintiffs’ land, a greater price than they were paying for such ore, and that he would not pay a greater price for ore taken from other lands than they were paying for ore taken from their own. He also agreed to sell the plaintiffs all ore thereafter purchased by him, for which he was to receive four dollars per thousand pounds more than they were paying at the time to the miners on their own land. The defendant further “ binds himself, his heirs, executors, and administrators, firmly by these presents, in the sum of five hundred dollars lawful money, liquidated damages ; which said sum the said George Towl agrees and binds himself to pay to the said party of the second part, to be collected in any court of competent jurisdiction, upon the violation of any of the stipu-



lations or conditions of this agreement, or upon his failure to perform the same."

Two breaches of the conditions of the agreement are assigned in the petition. One is, that the defendant purchased 6,000 pounds of ore at two dollars per thousand more than the plaintiffs were paying. The other is, that he purchased 25,400 pounds, which he refused to sell to them.

It is urged that the contract is in restraint of trade and against public policy, and is therefore void; that it is void for want of sufficient consideration; and that the sum of five hundred dollars mentioned in it is a penalty, and not liquidated damages.

A contract prohibiting one of the parties from carrying on any specific trade or business, without limit as to time or place, is doubtless void; such contracts, to be binding, must have reasonable limitations as to the place. What would be reasonable limitations must greatly depend on the circumstances of each case. It must appear that such contract imposes no restraint upon one party that is not beneficial to the other. The prohibition should not extend any further than will fully protect the party for whose benefit the contract is made in his occupation or business. If the prohibition extends beyond this, it is an unreasonable restraint of trade, and will render the contract void. (21 Wend. 158; 19 Pick. 51; 7 Blackf. 344; 10 Barb. 641; Story on Cont. § 552.)

Does the contract under consideration come within the rule above prescribed? It does not prohibit the defendant from carrying on the business designated at any place he may choose. It only limits the manner by fixing the prices at which he may buy and sell, and the persons to whom he may sell. It is not a restriction of trade according to any proper construction of the rule. This principle of law had its origin in the apprentice system of England, where an apprenticeship was required before engaging in any trade or business. No satisfactory reason has been found for its existence in this country, where no such system prevails; and although it has been too long acquiesced in here to be now disturbed, we are unwilling to extend it to cases not clearly within its provisions and sanctioned by precedents. Under this view of

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the case, we think that the contract is not void for being in restraint of trade. There is no question but that the suits instituted before the justice were without foundation, and that the plaintiffs had not even a color of right to recover. To make the settlement of assumed rights a sufficient consideration for a promise, there must be at least an appearance of right sufficient to raise a possible doubt in favor of the party asserting the claim. The ore purchased by the defendant, for which the suits were brought, was evidently the property of the parties selling it, and, if they sold it in violation of their contracts with the plaintiffs, they must look to them for redress. The plaintiffs, having clearly no just claim against the defendant, had no right to sue him, and can derive no advantage from having done so. The dismissal of suits so palpably unjust forms no adequate consideration for a promise. (13 Pick. 284; 5 Pet. 114; 21 Penn. 237; 2 Moore, 297; 14 Conn. 12; 4 Met. 270.)

In the case of *Basye v. Ambrose*, 28 Mo. 39, the court says that "where the agreement secures the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely."

The authority is clearly in point in the question we are now considering. The sum sued for is to be treated as a penalty, and not liquidated damages.

The judgment of the court below is affirmed. The other judges concur.

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STATE OF MISSOURI, Plaintiff in Error, v. CHARLES C. SMITH,  
Defendant in Error.

1. *Practice; Criminal — Indictment — Appeal, without Final Judgment.*— Where the record simply shows that the court below quashed an indictment, but no final judgment was rendered, nor was the defendant discharged, no appeal will lie from the action of the court.

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*Error to Second District Court.*

*L. Brown*, for plaintiff in error.

*Foster & Hatcher*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

Defendant was indicted, in the Circuit Court of New Madrid county, for willfully, maliciously, and cruelly killing a mare, and he appeared in court and moved to quash the indictment, which motion was sustained. The circuit attorney excepted to the ruling of the court, and prosecuted an appeal to the Second District Court, where the appeal was dismissed, and the case is now brought here by writ of error.

The record simply shows that the court quashed the indictment, but no final judgment was rendered, nor was the defendant discharged. Till final judgment no appeal will lie. (*State v. Gregory*, 38 Mo. 501.)

The judgment of the District Court dismissing the appeal was right, and must be affirmed. The other judges concur.

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WYLLYS KING, Plaintiff in Error, *v.* WILLIAM H. MOON *et al.*,  
Defendants in Error.

1. *Practice—Trial—Appeal—Review of Evidence—Causes at Law and in Equity distinguished.*—In common law proceedings, as to questions of fact which are properly triable before a jury or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.
2. *Fraud—Presumptions in Law and Equity.*—Fraud may be presumed in equity, but must be proved at law. Therefore, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict.
3. *Fraud—Real Property—Sale of—Possession not changed after—Fact of, how far proof of Fraud.*—The fact that after sale of real estate possession was never taken, nor were acts of ownership ever exercised over the property by the vendee, would not, under the present system of registration, be conclusive evidence of fraud, but in connection with other circumstances indicating fraudulent intent is entitled to some weight.

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*Error to Second District Court.**Abner Green*, for plaintiff in error.

I. This being a suit in equity, the District Court should have reviewed the evidence in the cause. The errors of the Circuit Court were sufficient to justify it in reversing the judgment. The issues involved in the cause having been submitted to a jury by the Circuit Court, and the jury failing to agree and having been discharged, the trial was then at an end, and the cause should have been continued. The court, therefore, had no authority to render judgment in the cause without another trial, unless the parties had in express terms waived their right to a trial and agreed to submit it to the court.

II. The chief error committed by the court was the erroneous finding of the facts; and this being an equitable proceeding, the court will reverse if the evidence did not warrant the finding. (*Pipkin v. Allen*, 24 Mo. 520.)

*John L. Thomas*, for defendants in error.

I. The court committed no error in deciding the case after issues were submitted to the jury and the jury failed to agree upon a verdict. Under the English chancery practice the chancellor had the undoubted right to even disregard the verdict of a jury; but our practice act has changed the common law rule to some extent. The court in our State has no right to enter judgment nor absolute verdicts. (*Cochran v. Moss*, 10 Mo. 416; *Woodson v. McClelland*, 4 Mo. 495.) But none of the cases go so far as to decide that a judge has no right to enter judgment according to the facts, if the jury has failed to agree. This was a case properly triable by the court, and neither party was, as a matter of right, entitled to have issues framed and submitted to a jury. (*Morris v. Morris*, 28 Mo. 114.) And the court was certainly under no greater obligation to submit issues to a second jury, after the first failed to agree, than to submit issues to the first jury. After the jury failed to agree and were discharged, then the case stood as if no issues had ever been submitted. The

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court then assumed to decide the case, and the plaintiff assented to it. Therefore, if the plaintiff had a right to have issues submitted again, yet, having assented to the court's deciding the case, he thereby waived such right. The fact that William Moon remained in possession of the land after sale raises no presumption of fraud. (35 Mo. 208.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit, in the nature of a bill in equity, brought by the plaintiff, King, to set aside a deed made by William H. Moon, one of the defendants, to his brother Thomas Moon, on the 27th day of December, 1860, conveying about two hundred and fifteen acres of land lying in Jefferson county. The claim to relief is based on the assumption that the conveyance was fraudulent, and made by W. H. Moon to his brother with intent to hinder, delay, and defraud his creditors. On the trial in the Circuit Court a jury was impaneled and issues framed submitting to their consideration the question of fraud. The jury, being unable to agree, were discharged, whereupon the court, of its own motion, without any new submission, proceeded to determine the cause, and found for the defendant.

The plaintiff then appealed to the Second District Court, where the judgment of the Circuit Court was affirmed, principally on the ground that the appellate court could not revise the facts, and that they had no authority to pass upon the weight of testimony. In this position the District Court unquestionably erred; they made a wrongful application of a correct principle.

In common law proceedings, as to questions of fact which are properly triable before a jury or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.

When the Circuit Court proceeded to determine the cause, after discharging the jury, the plaintiff gave his assent, but the defendants objected; but as the finding was for the defendants, and they



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do not complain, we do not think the plaintiff can now interpose an objection to the action of the court.

The facts appear to be that when the conveyance was executed Wm. H. Moon was a merchant doing business in the town of De Soto, Jefferson county, and that he was in embarrassed circumstances—in fact, insolvent. About the middle of February, 1861, he made an assignment of his store, goods, and other personal property, together with about twenty acres of land, being all the property of which he was possessed, to one James P. Cape, for the benefit of his creditors. The assignee, Cape, sold the property, and realized from it about the sum of \$1,500. Debts were presented against the estate, and allowed by the assignee, to an amount about equal to the said sum of fifteen hundred dollars, and were duly paid. One of the debts so presented, allowed, and paid, was a note due by Wm. H. to Thomas Moon for one hundred and ninety-nine dollars, which William H. Moon presented in person for allowance to the assignee. It also appears that, some time anterior to the assignment, Wm. H. Moon had executed a deed of trust on part of the property assigned, for one thousand dollars, to Bell, Tilden & Co., who were his creditors.

Judgments were obtained against Wm. H. Moon, as follows: One in favor of Doan, King & Co., January 19, 1863, for the sum of \$445.79; one in favor of Shapleigh, Day & Co., in June, 1864, for the sum of \$252.53; and also one in favor of Wm. F. Enders & Co., in June, 1864, for \$356.30. These judgments were all rendered on debts due previous to the 27th day of December, 1860, the date of the execution of the deed from William to his brother Thomas, and none of them were proved up or allowed against the assigned property.

Execution was regularly issued on the judgment in favor of Doan, King & Co., and the land in controversy levied upon and sold; and King, the plaintiff in this suit, became the purchaser, and received the sheriff's deed therefor. There is only one question, and that is, whether the conveyance made by Wm. H. to his brother was fraudulent, so as to be void as to the existing and previous creditors of the former. While the law will not imply or presume fraud, yet common experience teaches that it is seldom

that any direct or positive proof can be obtained in regard to any given transaction, no matter how fraudulent it may be.

Fraud, in common with the highest crimes known to the law, is commonly made out by circumstantial or presumptive evidence. The very charge implies color and disguise, to be dissipated by *indicia* alone. (Per Cowen, J., *Waterbury v. Sturtevant*, 18 Wend. 353.) Fraud may be presumed in equity, but must be proved at law; therefore, courts of equity, it is said, will act upon circumstances as indicating fraud which courts of law would not deem satisfactory proofs; or, in other words, will grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient to justify a verdict. (*Jackson v. King*, 4 Cow. 207; 1 Story Eq. Jur. §§ 190-3, and cases cited; 3 Greenl. Ev. § 254.) The range of inquiry in the investigation must necessarily be very extensive and bring within its scope all the circumstances bearing upon the question.

A succinct review of the testimony will be necessary to arrive at a correct conclusion. Mr. Cape, the assignee, was sworn on behalf of the plaintiff, and testified to the facts as above set forth in regard to the assignment, and said that, at the time the assignment was made, Willam H. Moon was largely indebted, owing something like \$3,000, and that about one-half that amount was allowed and paid by him; that after the date of the conveyance of the land—to-wit: on the 27th day of December, 1860—William H. continued to reside on the same for two or three years and cultivate and use it as his own; that he raised three crops on it after the pretended sale, and then left, for fear of the soldiers, leaving his family and son Joseph on the farm. Witness lived near the place, and never knew Thomas Moon to exercise any control over the land; he had never been in possession of it; the first he heard of Wm. H. making a deed to his brother Thomas was when he was taking an invoice of the assigned goods.

George Hughes states that some time in the night of the 27th of December, 1860, after he had gone to bed and had been asleep, he was awakened by Wm. H. Moon and Thomas Moon, who

came to his house and asked him to write a deed for them. He got up and wrote the deed for them, which embraced the same land in controversy, and handed it to William H. Thomas then pulled out of his pocket a small pocket-book and handed it to William, and said: "This, and the notes, will make it all right for the land." "Yes," said William H. But the witness saw no money counted—saw no money pass between them. Thomas did not hand William any note. Witness kept the deed, and next day went to the house of William H. and took the acknowledgment of his wife. William then took the deed and kept it. Witness lived about one mile from Thomas Moon's house, and about six miles from William H. Moon's house. Thomas owned a small piece of land of about ninety acres; was a small farmer; never seemed to have much money, and did not raise much surplus produce on his farm. He always had money to pay his bills. He never occupied or held possession of the land he got from William.

Hiram Reppy testified that he rented the land in question from Joseph Moon (William H. Moon's son) in the fall of 1864; that Joseph said, at the time, that his uncle Thomas had the renting of it. Witness has lived on the farm ever since; he never rented it of Thomas Moon, and Thomas has never been in possession of it, nor exercised any acts of ownership over it. He did pay Thomas \$15 as rent, but that was not all that he owed. William H. Moon lived on the farm until 1864, when he left, leaving his family there, who remained a short time and then left, except his son Joseph, who stayed on the farm a month or so longer; and when he left, witness took possession and has lived on it ever since, and is now in possession. The above, including the indebtedness heretofore spoken of, was substantially all the evidence introduced by the plaintiff.

The defendants, William H. and Thomas Moon, were then admitted to testify in their own behalf. Thomas Moon, one of the defendants, states that he is a defendant in the action; that he thinks the land in question was worth about \$1,000 when he bought it; that on the 27th day of December, 1860, William H. Moon, his brother, came to his house and said he wanted to sell

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his land. They talked a little while, and made a contract for the land. He agreed to give his brother Wm. H. one thousand dollars for the land. After supper they went over to George Hughes's to get him to write a deed; it was in the night when we got there; Hughes was in bed; he got up and wrote a deed for them for the land in controversy. Witness then took out his pocket-book and handed it to William H., and told him "this will make it all right for the land." "Yes," said William. Witness did not count any money at that time; he said he had counted it before he left home. Witness did not take the deed then; he left it with William to have the acknowledgment of William's wife taken the next day. He did not see the deed for one or two months afterward; left it with William for him to send and get it recorded; did not take possession of the land afterward, and has never had it in his possession. He got \$400 from his father some time before he bought the land. His father gave it to him, but he could not tell how long it was before the purchase; it might have been a year. He had some money of his own; he could not tell exactly where he got all the money; he had the money by him when William came to sell him the land. He has about ninety acres of land; is a farmer; but does not generally raise much surplus produce. William H. never talked with him about selling the land, until he came to his house on the 27th day of December, 1860, when the trade was made. He did not agree with William to let him have the land back if he paid him a thousand dollars within two years, and did not agree with him to not put the deed on the record for a time. Witness had a note for \$199 against his brother William when he bought the land; he did not put that in as a part of the pay for the land, because William said that he needed \$1,000, as he was about to buy out his partner, E. M. Boly, and that he would pay the note to him in store goods. William afterward made an assignment for the benefit of his creditors, and he got the note allowed, and it was paid by the assignee. The note was given for a debt which had existed about a year before. When he handed the purse to William, and said "here is your money," William asked if that was the same money which they had counted before they left the house, and he

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answered, "Yes." William said that he must fix up the matter that night; that he had to be at his store early the next morning. Witness was sure that it was not two months after the deed was made that he got it; he called for and got it from his brother William at De Soto. William had it recorded. He is not sure whether it was before or after the sale of the goods by the assignee that the deed was given to him; does not recollect what kind of money was paid for the land; he got none of the money from William, nor did he know that he was in embarrassed circumstances.

The deposition of William H. Moon was then introduced. He states that he sold the land to his brother Thomas, and that he paid him \$1,000 for it. The reason why the deed was taken after night was because there was no person left in the store, and he was obliged to be back there the next morning. When he received the \$1,000 from his brother Thomas for the farm, there was an agreement that he was to have the place back, provided he paid back the money with interest. This agreement was verbal; no obligation was entered into. He was to have the place back at any time within two years. In February, after the deed was made, he executed an assignment, for the benefit of his creditors, of all his goods and chattels. But a few days before he made the assignment he told his brother Thomas that he thought enough money could be made out of his property to satisfy the balance of his creditors, and that he might, if he saw proper, keep the land and have the deed recorded; that immediately afterward Thomas had the deed recorded; he had never done so before, because he (William) had no previous idea of having to make an assignment. He then speaks of the note for \$199, and says it was paid by the assignee out of the assigned property; that he stayed on the place because he was unable to get away; that he rented the place of Thomas, and did repairing sufficient to pay for the rent. This is in substance all his testimony. On his cross-examination no new facts were elicited.

Before a transaction is declared fraudulent, the proof should be very clear and satisfactory, and inconsistent with the idea that it was entered into with honesty and good faith. Judge Napton,



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in *Dallam v. Renshaw*, 26 Mo. 544, says: "But we have acted on the principle of giving the defendants the benefit of a construction favorable to the honesty of the transaction, when that construction would as well consist with the circumstances as a contrary one; and where doubts are entertained as to the true construction to be given to the conduct of the parties, those doubts should be resolved in favor of the defendants."

Admitting the above principle to be correct, can this transaction be sustained upon a full review of all the facts? All the witnesses concur in stating that Thomas was a man possessing limited means, and would not be very likely to have any considerable amount of ready money in his possession. He himself acknowledges that he raised scarcely any surplus for sale on his small farm, and he does not pretend to account for the purchase-money, except as to the \$400, which he says was given him by his father. But a most strange and inexplicable part of the transaction is what took place at Hughes's. It seems that the brothers had had no previous understanding or arrangement about the sale or purchase of the land, and that William went to Thomas's late in the evening, when the agreement was perfected, and they then proceeded to the house of Hughes and found him asleep; they insisted upon his getting up and writing the deed, which he did accordingly. The reason assigned for this haste, and requiring the conveyance to be written at such an unseemly hour, is utterly inadmissible, because no validity was imparted to the instrument that night; it was neither acknowledged nor delivered. But, taken in connection with other acts which transpired at the house of Hughes, it has a strong tendency to develop and expose the true character of the whole arrangement.

That the pretended payment of the purchase was pre-arranged and fixed up for the occasion, to give the affair the semblance of honesty in the presence of Hughes, is so strongly inferable that any other conclusion would amount to a credulity at once ridiculous and absurd.

Thomas pulled out a small pocket-book, and said: "This and the note will make it all right." No money is seen, and in all the subsequent contests growing out of this sale no attempt is

made to account for or show what was done with either money or pretended note. But why was the payment made at that time? The contract was not executed nor did any title pass. The deed was not acknowledged on that night, nor was it delivered; and till both of these circumstances took place it was a complete nullity.

That the matter was entered into with secrecy is apparent from the fact that William lived in the town of De Soto, and he went to another township to have the conveyance written and get a magistrate to take the acknowledgment. It was not admitted to record nor delivered till something like two months after its execution, and then when an assignment was made of the balance of the property. Moreover, the possession was never taken, nor is there any evidence that Thomas Moon has ever exercised any acts of ownership over the property. This, under our system of registration, would not be conclusive; but, considering the condition of the parties and all the circumstances surrounding this whole matter, it is entitled to some weight. Nor is the case in the least helped by the evidence of the defendants. They contradict each other in important and essential particulars, and they materially tend to corroborate the other witnesses. It is hardly credible that a man in Thomas's circumstances in life could not give some intelligible and satisfactory account of where he got the money to pay for the land, or that he would suffer so valuable a piece of property to remain in the possession of others without producing anything for his benefit, while he remained quietly on his small farm. The testimony of William accords well with the main fact that he was to retain the farm, and doubtless he would have done so had he not been hard pressed and forced to make an assignment. The deed was held in his possession for about two months; was not placed on record nor delivered; and this, too, when it is pretended he had the purchase-money in his pocket all the time. That Thomas knew William's embarrassed and insolvent condition, and that the arrangement was made with that fact in view, there can be no doubt, in my mind.

Taking all the circumstances together, the inference is convincing, the conclusion irresistible, that the transaction was simulated and fraudulent, and that the deed should be set aside.

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The whole affair was the weak contrivance of men attempting to secure for the property of one of them an immunity and exemption contrary to law. *Bona fide* transactions do not need to be clothed with the extraordinary pretense of prompt payment, which is a distinguishing feature in this case, when the deed is left in the hands of the grantor, till the events happen which we may reasonably suppose were in the contemplation of the parties.

The judgment will be reversed, and judgment entered in this court for the plaintiff. The other judges concur.

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AUGUSTUS WHITE *et al.*, Plaintiffs in Error, v. ELIZABETH DREW *et al.*, Defendants in Error.

1. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust raised by implication to a certain proportion of the estate. When trust money is used by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land, and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.
2. *Partition—Trust Estates, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.

*Error to Sixth District Court.*

This case originated in the Marion Circuit Court. The facts will be found stated in the opinion of the court.

*Lipscomb*, and *Dryden & Lindley*, for plaintiffs in error.

The only question in this case is as to the propriety of the action of the Circuit Court in refusing to order payment of the \$939.63, plaintiffs' net share of the rents and profits taken by

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the ancestor of the defendants out of that part of the proceeds of the sale of the land represented by the defendants in error. A double relation existed between Drew, the deceased, and the plaintiffs. They were tenants in common of the land; and he was trustee, and they were *cestui que trusts*.

I. As between tenants in common, one tenant has an equitable lien upon the common property for his share of the rents and profits received by his co-tenant. (*Hannan v. Osborn*, 4 Paige Ch. R. 343.) The equity here claimed rests upon the principle governing the rights of partners. Where one partner takes out of the concern more than his due proportion of the partnership effects, it is the well-settled law that the other partners have a lien upon the common property for their indemnity and reimbursement. (Story on Part. § 97.) Such rents and profits, it may be conceded, are a personal charge upon the co-tenant receiving the same, and upon his death are payable primarily out of his personal estate (it is the policy of the law to discourage the sale of the realty); but where, as in this case, there is no personalty out of which to enforce payment, a court of equity will enforce the lien against the common property. (4 Paige Ch. R. 343.) The fact that the liability of the tenant for the rents and profits is a personal charge, and upon his death the liability would be payable primarily out of his personal estate, does not militate against the proposition that the co-tenant has a lien on the common property for his indemnification. It is equally true of every other lien that the debt which operates as a lien is a personal charge against the debtor; *e. g.*, the vendor's lien, the mechanic's lien, the lien of a judgment, etc., etc.

II. Again, the demand of the plaintiffs here is not merely a prior equity, but it is the only equity. Neither the administrator nor the creditors whom he represented had any equity in the common property; nor had they, or either of them, any legal estate in said property. Now, if this action had been brought and prosecuted against Drew, in his lifetime, and the rights of the parties had been found and declared by the decree of the court, just as they have been, and the common property been sold and the proceeds brought into court, just as was done in this case,

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would he have been allowed to withdraw from the custody of the law his share of the fund without first paying the plaintiffs what he owed them for rents of the common property? If not, upon what principle can it be maintained that his administrator can do so? The result of the decision of the Circuit Court is to postpone lien-holding *cestui que trusts* to a non-lien-holding foreign creditor, whose demand will absorb the whole fund and leave the plaintiffs remediless.

*Redd & McCabe*, for defendants in error.

I. Plaintiffs' claim for rents and profits was a debt existing against Joseph Drew, the trustee, at the time of his death. Section 1, chap. 123, Gen. Stat. 1865, provides that all demands against the estate of a deceased debtor shall be divided into classes. Section 8 authorizes the creditor to establish his demand by the judgment or decree of the Circuit Court, but requires the judgment to be exhibited to the County Court for classification. Section 4 provides that, for the purpose of classification, the judgment shall be considered as a demand exhibited from the time of the service of the original writ on the administrator. Section 26 requires all demands to be paid in the order in which they are classed, and if there be not assets sufficient to pay all demands in any one class they shall be paid *pro rata*.

The proceeds of the sale of that portion of the real estate belonging to Joseph Drew, not affected by the trust, are assets in the administrator's hands, to be administered for the benefit of all the creditors of Joseph Drew; and to have plaintiffs' demand for rent paid out of it in full, without requiring him to present his judgment to the Probate Court for classification, would be a manifest violation of the statute in its letter and spirit, and greatly to the prejudice of other creditors by giving to plaintiffs a precedence over them. Where the statute gives to one creditor or class of creditors a priority over others, the chancellor will enforce it, for "equity follows the law;" but in the absence of such legislation a court of equity will not give or create such preference.

II. The defendant Elizabeth Drew was entitled to dower in



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the portion of the real estate upon which a trust was declared in favor of plaintiffs.

If Joseph Drew, in paying for the land, used, as found by the court, \$950 of money belonging to the estate of O. M. White, in his hands as administrator *de bonis non*, it was a misapplication of the fund, constituting a breach of trust on his part, and plaintiffs had their election to take either one of two remedies; either, 1, To hold him and his securities on his administrator's bond responsible for the money and interest, which they would undoubtedly have done had the investment proved a bad one; or, 2, To proceed in equity to have a trust declared *pro tanto*. The deeds vested in Drew an indefeasible estate of inheritance in fee simple, and plaintiffs took no interest in the land, by virtue of the fact that it was in part paid for with the money of White's estate, until they had made their election, and this was not done until after the inchoate interest of Elizabeth became perfect by the death of Joseph Drew. Joseph Drew was seized of the entire tract of an estate of inheritance in fee simple, and remained so seized at the time of his death. This being the case, the statute provides that the widow shall be endowed, with one only exception—where she has relinquished her right in the manner provided by law, of which there is in this case no pretense. (R. C. 1855, p. 668.)

Conceding that the trust may, at the election of plaintiffs, be enforced as against Joseph Drew and all volunteers claiming under him, defendant Elizabeth submits that as to her dower interest she does not occupy the position of a volunteer. As to her dower interest she occupies the position of a *bona fide* purchaser for a valuable consideration, without notice of plaintiffs' latent equity, and as such is entitled to the protection of the chancellor. 1. The dower right of the wife during the life of the husband is an inchoate interest in the land, which vests as soon as there is a concurrence of marriage and seizin, becoming consummate at the death of the husband. (4 Kent, 49.) 2. She acquired this title and interest as a purchaser. Purchase is any method by which lands are acquired by or in consequence of the act or contract of the parties, and not by descent. (2 Blackst. Com.

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241-2.) Marriage is a legal relation created by the contract of the parties; the inchoate title or interest of the wife in the husband's realty is incident to and acquired by that contract, and vests upon the seizin of the husband; hence she is, as to that interest, a purchaser, in the full legal acceptation of that term. Being a purchaser, she acquired her interest for a valuable consideration. Marriage is a consideration deemed as valuable in law as the payment of the full value in cash. (4 Kent, 462; Chitty on Cont. 27-8; 2 Blackst. Com. 296-7; Story v. Arden, 1 Johns. Ch. 271.)

Joseph Drew, at the time of the marriage, was seized in fee of the entire tract; by the marriage, defendant Elizabeth acquired, as a *bona fide* purchaser, without notice of plaintiffs' latent equity, an inchoate interest in the entire tract, which became consummate by the death of Joseph Drew, before plaintiffs elected to proceed against the land. Under these circumstances the equity of plaintiffs ought not to be enforced against her interest.

BAKER, Judge, delivered the opinion of the court.

The plaintiffs are the only surviving children and heirs at law of Obed M. White, who died in 1838 intestate, leaving a small estate in Marion county. Joseph Drew, now deceased, became administrator of said estate in 1847, and shortly afterward purchased a tract of land situated in said county, for which he paid \$1,590; a part of the purchase money, \$950, was funds belonging to said estate. The land was conveyed to him as in his own right, and he took possession of it at the time of the purchase, and continued to occupy and use it until his death, which occurred in 1866. The rents and profits, after deducting all moneys expended in improvements and repairs, amounted to \$939.63, while the same was occupied by said Joseph Drew. This suit was brought against the said Elizabeth Drew, who is the widow, and Dolphus, who is the only child and heir at law, of the said Joseph Drew, and T. E. Hatcher, the administrator of his estate, to have a resulting trust declared in said lands in favor of the plaintiffs, and for an account of the rents and profits. On the hearing, the facts were found by the court, the substance of which is stated

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above, and in the decree the court declared  $\frac{9}{15}\%$  of said lands to be held by the defendants in trust for the plaintiffs, and, for the purpose of partitioning the same, ordered the land to be sold. The whole tract brought the sum of \$6,400. The plaintiffs filed a motion, in which they ask the court to "order a distribution of the purchase money; that they be paid out of the same  $\frac{9}{15}\%$  thereof, being the share of the plaintiffs as ascertained by the decree in the case; that the costs be paid out of the residue of the funds; that the value of the dower interest of the widow in the remainder be paid; and that out of what should remain the plaintiffs be paid the sum of \$939.63, the amount found due them for the rents and profits."

It is stated in the motion that the estate of said Joseph Drew was wholly insolvent. And the court so found on the hearing.

The court then "ordered and decreed that the sheriff, out of said fund, pay the costs accruing in the cause from and after the rendition of the interlocutory decree in this cause, amounting to the sum of \$119.25; that out of the residue he pay the plaintiffs the  $\frac{9}{15}\%$ , amounting to the sum of \$3,752.66; that out of the remainder he pay all the costs accruing in this case from the beginning to the rendition of the interlocutory decree herein, amounting to the sum of \$82.14; that he then pay to Elizabeth Drew, widow, the sum of \$582.93, the present value of her dower interest in the remainder of the fund, after paying all costs and the share of  $\frac{9}{15}\%$  decreed to plaintiffs; and that the remainder of said fund, to-wit, \$1,863.02, be paid to T. E. Hatcher, the administrator of said Joseph Drew, to be by him administered according to law. The court doth further adjudge and decree that the defendant Elizabeth Drew is not entitled to dower in that portion of said estate and fund decreed to plaintiffs. \* \* \* \* It is further considered by the court that the plaintiffs have and recover of the goods and chattels and estate of Joseph Drew, deceased, in the hands of the defendant, T. E. Hatcher, administrator of said Joseph Drew, the sum of \$939.62, the amount of rents and profits ascertained to be due from said estate to the plaintiffs; and that said sum be paid, by said Hatcher, out of the general assets in his hands for that purpose, after said judgment

has been presented and classified by the County Court of Marion county."

The plaintiffs removed the case to the District Court by writ of error, where the judgment was affirmed, and the cause is now here on error. The plaintiffs complain of the action of the Circuit Court in refusing to order the payment of the sum of \$939.62, found to be due them for rents, etc., out of the money directed to be paid to the administrator. It is urged that the plaintiffs and defendants occupy the relation of tenants in common, and that the plaintiffs have an equitable lien on the defendants' interest in the land for the rents and profits arising from the use of their own interest, and that such lien would entitle them to the payment of their claim out of the defendants' interest, to the exclusion of other creditors. In support of this position, we are referred to the case of *Hannan v. Osborn*, 4 Paige Ch. 336. That was a proceeding for a partition between several tenants in common, and for an account of the rents and profits received by one of the defendants. In ordering a sale of the property, the court intimated that the amount due from one of the tenants in common to the others, for rents and profits, was an equitable lien on the interest of the party receiving such rents, etc.

The reason for such lien is not stated by the court, but is probably based on the principle that courts of equity sometimes treat real property and the profits arising therefrom as the same; and when one of the parties in interest has appropriated such profits, being a part of the common property, to his own use, they deduct the amount so appropriated from the share of such party in the remainder, when a partition of the property is made.

If this is a correct principle of law, can it be applied to this case, where the parties were not strictly tenants in common? The plaintiffs had no legal title to the property. Their right was a secret trust, raised by implication, to such proportion of the land as that part of the purchase money used, belonging to the estate of their ancestor, bore to the whole of the purchase money. The rule on which the trust is raised is that, when trust money is used by a party intrusted with it in purchasing real estate in his own

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name, courts of equity will follow the money into the land, and raise a trust for him whose money is thus used.

But they will not go further and create a lien on other property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not clearly within established rules. Secret trusts in and constructive liens upon real estate are now discouraged. (10 Barb. 626.)

Elizabeth Drew, one of the defendants, also objects to the ruling of the court. She insists that her dower interest extended to the whole tract of land, for the reason that she had no knowledge of the rights of the plaintiffs when she intermarried with the trustee, and that she occupies the position of a purchaser without notice. The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not. The application for dower in the whole property was properly denied by the court.

The judgment is affirmed. The other judges concur.

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OLIVER D. HARRIS, Plaintiff in Error, v. JOHN VINYARD,  
Defendant in Error.

1. *Practice—Ejectment—Counter Claim—Specific Performance.*—Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father.

*Error to Second District Court.*

This was a suit for the recovery of certain lands in Jefferson county. Defendant admitted having possession of a portion of the land, but set up a cross-bill, alleging in substance that the property in dispute was, prior to 1855, public land adjoining and



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partially embraced within his farm in Jefferson county; that when about to enter this tract in the land office, he found that plaintiff's father had already entered it in the name of "Oliver D. Harris;" that said Harris was finally prevailed upon to execute a bond to convey the tract to defendant, on condition that defendant would pay a certain sum, and would not apply to set aside the entry made by Harris; that on the faith of this agreement defendant had made large improvements on said land; that plaintiff's father had entered the land in plaintiff's name to avoid his creditors. Defendant tendered the sum agreed upon in the bond, and then asked that the title of the land be divested out of plaintiff and be vested in defendant.

*C. C. Whittlesey*, for plaintiff in error.

I. Admitting that the father of the plaintiff, Oliver Harris, entered the land in the name of his son Oliver D. Harris, the plaintiff, yet the entry by the father in the name of his son must be considered as an advancement to the son, and there was no resulting trust in favor of the father, Oliver Harris. (Notes to *Dyer v. Dyer*, 1 Wh. & Tud. Eq. Cas. 195, 204 Am. Notes; *Jackson v. Feller*, 2 Wend. 654; *Partridge v. Havens*, 10 Paige Ch. 618.) It was not necessary for plaintiff to prove that he himself made the entry of the land. It was sufficient that he produced the patent of the United States conveying to him the land in controversy, and that gave him the legal title. (*Bagnell v. Broderick*, 13 Pet. 436; *Carman v. Johnson*, 20 Mo. 108; *West v. Cochran*, 17 How. 403; *Hooper v. Scheimer*, 23 How. 235.) And the subsequent acts of the father could not restrict the presumption of an advancement in favor of the son, so as to create a resulting trust in favor of the father.

II. The entry having been made in the name of the plaintiff, his father, Oliver Harris, could not by any instrument of writing affect the rights of the plaintiff, who was a minor; and therefore could not, as agent or guardian, make a contract which would not be violable upon his coming of age. Had plaintiff made such a contract personally, the bringing of this suit would avoid the contract.

III. There was no consideration for the contract made between defendant and the father of plaintiff which would authorize the defendant to demand a specific performance of the contract from the plaintiff. The defendant did not show that he had any equity or claim to a pre-emption under the acts of Congress, at the date of the agreement, August 22, 1855. Defendant did not bring himself within the provisions of the act of Congress of Sept. 4, 1841 (5 U. S. Stat. p. 456, § 15); nor those of the act of March 2, 1843 (5 U. S. Stat. 620; *Fenwick v. Gill*, 38 Mo. 510, 527); nor those of the act of March 3, 1857 (11 U. S. Stat. 186). The defendant has never paid any part of the price paid upon entering this land; and only when sued by the party holding the patent does he offer to pay the lowest graduation price, 12½ cents per acre, without showing that the land was subject to entry at that price. If Harris had fraudulently entered the land under the graduation act, which the recitals of the patent contradict, the defendant was assisting in the commission of a fraud by accepting the contract, and could have no cause of action against Harris, originating in such fraud. There was, therefore, no legal or valid consideration for the contract made by defendant with the father of plaintiff, and defendant was not entitled to a specific performance of such contract; and the instructions given by the Circuit Court were erroneous.

IV. If Oliver Harris entered the land in the name of his son Oliver D. Harris, the plaintiff, then the latter had both the legal and equitable title by the patent, and the defendant made a contract with a party who had no right or title in the land, and he cannot therefore be an innocent purchaser. The doctrine of innocent purchase does not apply to cases of this kind. The defendant, not being a creditor in any way, cannot invoke the interposition of the statute of fraudulent conveyances to create a trust in favor of plaintiff's father, and then to make that trust inure to the benefit of defendant.

*Green & Thomas*, for defendant in error.

I. The court committed no error in allowing defendant to prove the consideration which moved Oliver D. Harris to execute the

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bond. (1 Greenl. Ev. § 285; Ames v. Ashley, 4 Pick. 71, Tingley v. Cutler, 7 Conn. 291.) The evidence amply proved not only a good consideration, but a valuable consideration. Vinyard had an improvement on the land and had a farm adjoining it, and he intended to proceed to set aside Harris's entry, and so informed Harris. Harris, in order to prevent Vinyard from attempting this, proposed to give him the sixty acres of land, which included defendant's improvements. Vinyard accepted this proposition by way of compromise, and after obtaining the bond for title did not take any steps to set aside the entry. This was a good consideration, and sufficient of itself to make the contract valid. It does not matter whether Vinyard could have set the entry aside or not. (Chit. on Cont. 44.) Besides, Vinyard was to pay the same price per acre to Harris that Harris had paid to the government. This was a valuable consideration, and sufficient to uphold the contract. The amount of the consideration is immaterial.

FAGG, Judge, delivered the opinion of the court.

This was an action of ejectment, in the Jefferson Circuit Court, to recover certain real estate described in the petition. The answer of Vinyard, the defendant below, admitted the possession of only a part of the tract, alleging that he had lawfully acquired the same in pursuance of a written contract with Oliver D. Harris, the father of the plaintiff, for the purchase of the same. The death of the father is also alleged, and the remainder of his heirs asked to be made parties to the suit. The purchase-money for that portion of the tract claimed by defendant being tendered in court, a decree was asked for, divesting the heirs of Oliver D. Harris, deceased, of the same, and vesting the title thereof in the defendant. It appears from the record that an attempt was made to bring in the heirs of the deceased, only one of whom appeared and answered. The court thereupon proceeded to try the issue tendered by the defendant's answer, and upon a special finding of the facts in the case rendered a judgment granting the relief prayed for. It is manifest, upon this statement of the case, that such a judgment cannot be permitted to

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stand. The defense set up by Vinyard of his claim to the premises under a contract with the father of the plaintiff, as stated in his answer, was sufficient, if true, to defeat a recovery. It does not follow, however, that because that issue should have been found for him therefore he would be entitled to a decree vesting the title in himself as against all the heirs of the deceased party under whom he claimed.

The real question for determination was whether the land in question belonged to the plaintiff or to the estate of his deceased father. That was simply a question of fact depending for its solution upon the evidence in the cause, and which we do not feel authorized to review. That portion of the answer which prays for the decree of title in the defendant should have been stricken out. It has no proper connection with this case, and should be disregarded. The case will then stand upon the simple issue as between the plaintiff and the estate of his deceased father, it being averred by the answer that these names are identical.

The judgment of the District Court is therefore reversed and the cause remanded to the Circuit Court for further trial. The other judges concur.

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STATE OF MISSOURI, Respondent, *v.* DAVID BERLIN, Appellant.

1. *Practice, Criminal—St. Louis Court of Criminal Correction—Indictment—Information.*—Under the act creating it (Sess. Acts 1868, p. 269), the St. Louis Court of Criminal Correction could properly proceed upon information against persons charged with any of the offenses named in section 8, chapter 206, Gen. Stat. 1865, when committed within its proper jurisdiction. By that section such offenses are in terms made misdemeanors, and are therefore subject to an information, notwithstanding the provisions of section 24, article 1, of the Constitution of Missouri. Misdemeanors were not intended to be embraced in the words "indictable offenses," as used in that section, but only felonies.
2. *Witnesses—Husband and Wife—Information.*—The rule of law which would prohibit the wife from testifying in a criminal trial either for or against her husband will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.

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*Appeal from St. Louis Court of Criminal Correction.**Cline, Jamison & Day*, and *Patrick*, for appellant.

I. The statute requires the complaint to be sworn to by a competent witness. (Sess. Acts 1868, p. 269, § 20.) This complaint was made and sworn to by Ann Berlin, wife of David Berlin, the accused, who was an incompetent witness to testify against her husband in this prosecution against him for adultery or lewdly and lasciviously abiding, etc.; and hence incompetent, under the requirements of the law, to make oath to the information lodged against the accused. It is true the statute does not say, in so many words, that the party by whom the affidavit is made should be such a person as would be a competent witness in the cause; but the well-known and settled rule of law is that the lawful wife of a man is in no case competent to testify against him, or to make affidavits in any legal proceeding adverse to him, unless she be the immediate and direct object of the crime of misdemeanor complained of, and in cases of high treason. This doctrine is fully recognized in our Supreme Court in the case of *Hannah Coleman v. The State*, 14 Mo. 157. (Roscoe on Crim. Ev. 112-14; *Commonwealth v. Easland*, 1 Mass. 15; *State v. Anthony*, 1 McCord, 285; *Rex v. Sergeant*, 21 Eng. Com. Law R. 453.) The courts place the inadmissibility of the husband or wife to testify against each other on the broad ground of public policy, as well as that of identity of interest in most cases. The relation of marriage has long since been held too sacred to permit either party to appear in any legal proceeding against the other, except in a few excepted cases. And we know of no distinction between a wife going into court and swearing to a complaint against her husband, and getting on the stand as a witness to establish the charge before a jury. Both proceedings are alike prohibited by the policy of the law. In actions for adultery, bigamy, and the like, the wife is incompetent to testify on the grounds as above. (1 Greenl. Ev. § 339; 2 Stark. Ev. 400.) It has also been held that the wife is not competent to testify against the husband by his consent. (1 Greenl. Ev. 340; Sedg-



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wick v. Watkins, 1 Ves. 49.) The same doctrine has been held in this country. (1 Wheeler's Crim. Cas. 479.) This doctrine has even been carried to the extent of excluding the husband and wife from being witnesses in cases where they were not parties, but for whose immediate benefit the suit was prosecuted. (1 Greenl. 341; 1 Pierre Williams, 610-11.)

II. The accused has been convicted of an infamous crime, and deprived of his liberty without the interposition of a grand jury, and in contravention of the Constitution of the United States and that of the State of Missouri. (Amend. Const. U. S., art. 5, 6; Const. Mo., art. 1, §§ 18, 24.) The twenty-fourth section of the first article of our constitution declares that: "No person can, for an indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or by leave of court, for oppression or misdemeanor in office." The crime of which the accused was found guilty was, at the time of the adoption of our constitution, an indictable offense, and could alone be proceeded against in that manner, and has always been considered by civilized nations an infamous crime, punished by the severest and most degrading penalties, and could alone be proceeded against by indictment at the time of adopting the constitution of Missouri, as was always the case from the earliest organization of this State. Now, does the constitution mean that those criminal prosecutions that the legislature may see fit to direct to be had by indictment after its adoption shall be proceeded in in that manner, while all such as it may direct to be had on information only may be prosecuted to conviction without the intervention of a grand jury? If so, then the legislature could direct every crime known to the criminal calendar to be so prosecuted; and it would be no violation of the constitution, because it would cease to be an indictable offense as soon as the legislature should direct otherwise. This provision in the constitution concerning indictment by a grand jury cannot be trifled with in that manner. It was intended as a bulwark of liberty to protect the people against all change and encroachments on their sacred rights and privileges, and to guard them, by the

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intervention of a grand jury, against oppressive and malicious prosecutions instituted by a vindictive and influential oppressor. Hence the proceedings in this cause are all unlawful, and his trial and conviction on information are in open violation of the constitution. (2 Story Const. 1781-90; 2 Coke's Inst. 51-2; 2 Kent, 10-13; 1 Blackst. Com. App. 304-5; Hoke v. Henderson, 4 Dev., N. C., 15; 10 Yerg. 71.)

*Colcord* and *Mauro*, for respondent.

I. The law does not require the information to be sworn to by "a competent witness." The law provides that an information may be filed by the prosecuting or assistant prosecuting attorney, "or by any other person." \* \* \* "If filed by any other person, he shall swear to the same," etc. The complaint in this case is filed by another person and is duly sworn to. (Adj. Sess. Acts 1868, p. 269, § 20.)

II. Ann Berlin is a competent witness. Certainly the record fails to establish the contrary; and this, in the absence of proof, is the presumption of the law.

III. The offense charged is not an indictable offense.

IV. The verdict is sufficient to support the judgment. The second count is the only one which charges a lewd and lascivious cohabiting, etc. The verdict pronounces the party guilty as there charged; that is, at the time, place, and with the person alleged. It is a complete bar to any further prosecution.

V. The case is fully made out, and the record shows no cause why the judgment should be reversed. (State v. McDonald, 25 Mo. 176.)

FAGG, Judge, delivered the opinion of the court.

The appellant was proceeded against, in the St. Louis Court of Criminal Correction, upon information made by his wife, Ann Berlin. The complaint sets out specifically the following charges: 1. Open and notorious adultery. 2. Lewdly and lasciviously abiding and cohabiting with one Mary Jarrett. 3. Open, gross

lewdness and lascivious behavior. 4. An open and notorious act of public indecency, grossly scandalous.

The defendant was tried and convicted, and his punishment assessed at a fine of \$300 and imprisonment in the county jail for a period of thirty days. The proceeding was evidently instituted under the provisions of section 8, chap. 206, Gen. Stat. 1865, and the complaint charges in separate counts all the offenses embraced in that section. The question raised by the counsel for the appellant as to the power of the legislature to authorize such a proceeding may be briefly disposed of. The statute, in terms, makes all the offenses charged in the complaint misdemeanors. The act creating the Court of Criminal Correction for St. Louis County makes all such offenses cognizable before that tribunal, when committed within its proper jurisdiction, and authorizes proceedings to be instituted by complaint instead of indictment. The authority of the legislature to confer such a power upon that court was fully considered in a case determined by this court at its March term, 1867. (*State v. Ebert*, 40 Mo. 186.) The point was distinctly made in that case, as it is here, that the act establishing the Court of Criminal Correction was in direct conflict with the provisions of section 24, article 1, of the Constitution of the State. The court then held that mere misdemeanors were not intended to be embraced by the words "indictable offenses," as used in that section, but only felonies. The reasons for that conclusion need not be repeated in the present case. There is another question, however, raised by the motion in arrest of judgment, which we think is decisive of this whole case, and we proceed to consider it without reference to any others that are presented by the transcript. The complaint was made and sworn to by the wife of the defendant. The question here is, whether the rule of law which would have prohibited her from testifying on the trial, either for or against her husband, will also make her incompetent to initiate such a proceeding as this. In the amended act creating the St. Louis Court of Criminal Correction (*Adj. Sess. Acts '68*, p. 269), it is provided by section 20 that if the complaint is made by the prosecuting attorney or his assistant, it need not be under oath, and the party complained of is then notified by summons to

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appear and answer. If, however, it is made, in the language of the act, "by any other person," it must be sworn to, and thereupon a warrant is issued and the offender apprehended and held in custody or recognized to appear on the day of trial. In the very nature of the case, the words "any other person" can only mean such person as would be (under the general rules of law) competent to testify. It is true she is not introduced as a witness at the trial, but it is at her instance and upon her sworn statements of offenses committed by the husband that the process is issued and he is subjected to a criminal prosecution. The law excludes her from testifying in such a case, upon principles of public policy. "For," Mr. Greenleaf says, "it is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence." The exceptions to this rule are few in number, and are only allowed for the "sake of public justice," or "for the protection of the wife in her life and liberty." Certainly the reasons of the rule, as above stated, are broad enough to cover every imaginable proceeding against the husband not embraced in these exceptions. It will not be pretended that there is any thing in the case at bar that brings it within either class of excepted cases. To admit the practice of permitting either wives or husbands to institute such proceedings against each other would be establishing a precedent most dangerous to the best interests of society, and one which would go very far to break down this barrier so wisely interposed by the law for the protection of the sacred relation of marriage. The complaint not having been made by a person competent under the statute, the proceedings against the defendant were wholly unauthorized, and must fall to the ground.

The other judges concurring, the judgment of the lower court will be reversed and the cause remanded.

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City of St. Louis v. Tiefel.

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CITY OF ST. LOUIS, Plaintiff in Error, v. HENRY TIEFEL, Defendant in Error.

1. *Water Commissioners—Water Licenses—Actions touching—Constitution—Statute—Subject Matter, how far must be embraced in title—Construction of § 32, art. 4, Const. Mo.*—An act entitled "An act amendatory of an act to enable the city of St. Louis to procure a supply of wholesome water, approved March 13, 1867" (Adj. Sess. Acts Mo. 1868, p. 291), after authorizing the Board of Water Commissioners to require owners, etc., of buildings to take out water-licenses, goes on to provide, in substance, that parties who fail or neglect to comply with the provisions of the section shall be subject to the same penalties as the parties who use the water of the city and fail or refuse to pay the rate or assessment for the same; *provided, however*, that the Board of Health shall, in the first instance, declare by resolution that in its judgment the use of water from the city water-works in the houses of such parties is demanded as a sanitary measure for the preservation of the health of the inmates: *Held*, that the section, although it confers extraordinary powers, relates clearly to the subject intimated in the title, and is entirely congruous and connected with it, and is valid under section 32 of article 4 of the constitution of this State. The only intention of that section of the constitution was to prevent the conjoining in the same act of incongruous matters, and of subjects having no legitimate connection or relation to each other; and if the title of an original act is sufficient to embrace the provisions contained in an amendatory act, it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. It is plain, however, that the use of the words "other purposes," which have been extensively used in the title to acts to cover any and every thing, whether connected with the main question indicated by the title or not, can no longer be of any avail.
2. *Police Court—Jurisdiction—Actions touching Water Licenses.*—The St. Louis Police Court, being by the act establishing it limited to cases in which a justice of the peace would have had jurisdiction, or to those for violation of a city ordinance, or to cases of assault and battery, can have no jurisdiction over a complaint for violation of an act of the legislature in failing to take out a water-license; and, upon appeal to the Criminal Court, the case, upon motion, was properly dismissed for want of jurisdiction.

*Error to St. Louis Criminal Court.*

*H. A. Clover*, for plaintiff in error.

I. The two acts, the original and amendatory, ought to be construed together as making but one law; and looking at the two acts as one act, and regarding the provision of the second section of the amendatory act, no one can assert that the provisions of this section are not germane to the general object of the



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bill — the enabling the city of St. Louis to procure a supply of wholesome water.

If a provision of a particular section of a law is within the general scope, nature, and object of the law, then it is sufficient; and no constitutional objection lies that the nature of the particular provision is not expressed in the title of the bill. Any other rule than this would make the title of a bill express not only the "subject" of the bill, but all the details, minutiae, and machinery of the bill, making the title to the act as full and specific as the act itself. The other sections of this law all plainly and legitimately relate to the one subject. Look at the original law in the light of this objection. Its general title is as above quoted; yet the first section creates a quasi corporation, charged with important and extensive duties, and vested with extraordinary powers. Nothing hereof is expressed in the title. The seventh section abolishes the offices of superintendent of water-works and register of water-rates as formerly existing, and takes from the city all control of water-works existing for a long while previous, and vests such control in this new corporation. Nothing hereof is expressed in the title of the act. Another section makes particular provision for the taking and condemnation for public use of private property; provision is made for the issue of \$3,500,000 of gold bonds. Nothing of this appears in the title, and so in very much of the matters of the act; yet no one would seriously argue that this law in any of its parts was inoperative and void by reason of this constitutional provision. The general scope, nature, and object of this law is sufficiently well-stated in the title to meet any constitutional objection, and it does not aid the defendant's argument that this provision is found in another and an amendatory act — the acts being construed as one act.

It is argued by counsel that "an act which compels A. to pay for a water-license, whether he used the water or not, cannot be viewed as an act enabling B. to procure a supply of wholesome water." But an act which compels A. and B., property-owners, to use water when it is offered them, most assuredly is an act enabling the city of which they are inhabitants to procure a supply of pure and wholesome water if the water be pure and

wholesome. It is idle to call this measure an arbitrary tax, or unreasonable, harsh, or unnecessary. The first portion of the section undoubtedly is a part of a general plan for enabling the city of St. Louis to procure a supply of pure and wholesome water, and the proviso is added that the section shall not have force or effect unless the board of health shall do something. This is merely a proviso competent for the legislature to make, and there could be no necessity or propriety in expressing the subject of a proviso in the title to a bill.

II. The act is assailed on the ground that the law is void as being against common right. In an act to provide the city of Brooklyn with water, passed April 16, 1859, the eighteenth section reads as follows: \* \* \* "Such rents (water-rents for the supply of water) shall be collected from the owners and occupants of all such buildings, respectively, which shall be situated upon lots adjoining any street, avenue, lane, or court in said city, in which the distributing pipes have been laid, and from which they can be supplied with water, whether the water shall be used or not; such regular rates, together with all interest that may accrue thereon, shall be a lien upon such houses and lots respectively." So in section 24: "The said water-board shall, in every year, by resolution, fix the price, which shall be assessed upon every vacant lot situated upon any street, lane, alley, or court, etc., etc." Reference is made to this law simply to show that the act of March 23, 1868, is not an extraordinary law or peculiar to the legislature of this State—not to prove its constitutionality. Every act, and there are very many such, for the laying of water-pipe in cities, is upon the same principle of legislation. The very act under consideration, that of March 13, 1867, being the act to enable the city of St. Louis to procure a supply of pure and wholesome water, is based upon the same principle. The twenty-third section provides that whenever the city council shall, by a two-third vote, declare the laying of water-pipe to be necessary, the said board of water commissioners shall cause the same to be laid, and the cost of laying all such pipe shall be apportioned among the owners of property on such street, according to the fronting of their lots thereon, and be levied as a special tax, etc.

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Now, the principle of this legislation is precisely similar to that condemned by the St. Louis Criminal Court. A man, owner of property on a street, may not choose to use water from the public works; he may not like it; it may not agree with him; he has no necessity for it. Wherefore should he be compelled to pay for water-pipe laid in front of his ground, the water from which he will not use? He does not want it. Why should he be compelled to pay for the laying of the pipe to the lot of his neighbor who does want it? This is supposing he has a house with cisterns and wells supplying him with wholesome water. But if the lot is vacant, much greater is the injustice which the legislature imposes upon him; for if, as owner, he is unable to build, of what possible use can the pipe be to his vacant lot, and why should he be compelled to pay a proportionate share of the cost thereof when, in any event, he never intends to use the pipe or water? This is a mode, and a very proper mode, adopted by the law-making power to compel every landed proprietor to pay a due share of the burden or debt created by a needed and great public improvement. It should be remembered that there exists an absolute necessity for water in crowded cities, as a matter of comfort and health, indispensable in certain seasons to the well-being of the community. This necessity, being provided for, has to be paid for. While men planted a city by the side of the Mississippi river, nature did not thereafter carry this water into all the streets and avenues of that city, extending over an area of many miles; and yet this is an important essential of the health of the city. The legislature says it shall be brought so as to be capable of being used in every house where the same is demanded, as a sanitary measure, or it shall be paid for as if brought in and used.

III. It is contended that the Police Court had no jurisdiction over this cause or proceeding. This leads us to an examination of the meaning of the language of the second section, to-wit: "The parties who fail or neglect to comply with the provisions of this section shall be subject to the same penalties as parties who use the water of the city and fail or refuse to pay the rate or assessment for the same." We are immediately referred hereby to other legislation to find out what are the penalties which parties

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are subject to who use the water of the city and fail or refuse to pay the rate or assessment for the same. Referring to the city ordinances we find that "whoever shall, himself, or by any of his family, or any of his agents or servants, use the water from any part of the water-works, without license, shall forfeit and pay," etc. Now, it is impossible to say that the legislature may not vest the police justice of the city of St. Louis with jurisdiction over the failure or neglect of parties to comply with the provisions of this section; and if so, and if the legislature has vested this jurisdiction by this act with the police justice, it is idle to look further—as to the city charter of the city of St. Louis—for this grant of jurisdiction, for the act itself gives the jurisdiction. It is claimed that the act of March 23, 1868, is a penal statute, and must receive a strict construction. But we reply, it is the duty of the courts to uphold, wherever possible, the legislation of the land—*ut res magis valeat quam pereat*. Does the act contemplate after or subsequent action on the part of the city council before it could have effect? The reasonable, sensible, and proper interpretation of this act is this: Parties who fail or neglect to comply with the provisions of this section shall be subject to a penalty. That penalty is the same as is imposed upon parties who use the water of the city and fail or refuse to pay the rate or assessment; and, per consequence, and by indispensably necessary construction, through the same channel, by the same forum, in the same court. If the legislature had merely said "and suable or collectable in the same manner," or "to be enforced in the same manner or through the same jurisdiction," there could have been no doubt; nor is there any more room for doubt on a fair and reasonable construction of the law as it is. The case of *The Town of Fishkill v. The Fishkill and Beekman Plank Road Company*, 22 Barb. 634, decides nothing as to our own act.

*Krum, Decker & Krum*, for defendant in error.

The court below properly dismissed the case, if there was no jurisdiction either of the subject matter or over the person of defendant in the Police Court. (*Webb v. Tweedie et al.*, 30 Mo. 488.)

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I. There was no jurisdiction in the Police Court over the subject matter of the complaint. The jurisdiction of this court is fixed by statute. "The police justice" \* \* \* "shall have the same jurisdiction as a justice of the peace, within the limits of the city, in all State cases; he shall have jurisdiction over all cases arising under any ordinance of the city, and in all cases of assault and battery arising within said city, subject to appeal," etc. (Sess. Acts 1867, p. 69, § 18.) It is an inferior court, and "courts of inferior jurisdiction cannot go beyond the authority conferred on them by statute. They can assume no power by implication, but must keep within the powers expressly given them, and if they go beyond them their acts are void." (Cow. Tr. § 650, with numerous citations.) "And the ground of their jurisdiction must appear upon the face of their proceedings." (State v. Metzger, 26 Mo. 65, and authorities there cited.) 1. The case at bar is not one arising under any city ordinance. On the contrary, it alleges "the violation of an act of the General Assembly of the State of Missouri," for which the penalty is sought to be recovered. 2. As this is no case of assault and battery, then: 3, if the Police Court had jurisdiction at all, it must be by virtue of the power delegated to it in common with justices of the peace in State cases. But the jurisdiction of justices of the peace in State cases extends only (a.) To cases of misdemeanor punishable by fine not exceeding one hundred dollars. (Adj. Sess. Acts 1868, p. 82, § 6.) This authority appears, however, in St. Louis county, to be vested exclusively in the Court of Criminal Correction of St. Louis county. (Adj. Sess. Acts '68, p. 268, § 13.) (b.) To preliminary examinations in cases of crime. (Gen. Stat. 1865, chaps. 208, 209.) (c.) To actions for penalties, not exceeding one hundred dollars, given by any statute of this State. (Gen. Stat. 1865, chap. 177, § 2.) This being clearly no case of misdemeanor punishable by fine not exceeding one hundred dollars, nor an action for a penalty not exceeding one hundred dollars (because the act recited fixes neither punishment nor penalty, while the penalty sued for exceeds one hundred dollars), nor yet a preliminary examination in case of crime, it follows that the Police Court had, in no aspect of the case whatever, jurisdiction of the subject matter.



II. The act alleged to be violated (Act of March 23, 1868) is unconstitutional and void. "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." (Const. Mo. art. 4, § 32.) That act has the following title: "An act to amend an act entitled 'An act to enable the city of St. Louis to procure a supply of wholesome water,' approved March 13, 1867." (Sess. Acts 1867, p. 184.)

1. The subject matter of section 1 is indicated in the title. But the complaint is for a violation of section 2, the provisions of which are not expressed nor even hinted at in the title of the act. This section contemplates simply a compulsory process, which may be regarded as the levy of a tax upon certain individuals without having an object for such taxation expressed, or as a precautionary measure for the preservation of the health of a particular neighborhood, neither of which subjects is consistent with or expressed in the title. If the title of an act contemplates the grant of a benefit to a community, as it does in the present instance, a section of the act which compels certain individuals to pay for the privilege of such a benefit, whether they enjoy it or not, surely must contain a subject not expressed in the title. How can the imposition of this arbitrary tax upon certain individuals be consistent with the title of the act, when the purpose of the act—namely: the gain of a supply of wholesome water—may have been accomplished by the other provisions concerning the laying of pipes, and by the ordinances relating to the use of water and payment for licenses? And it will be observed that the provisions of the section in question do not depend upon the contingency of a failure to accomplish the purposes of the act through the operation of the other sections, but stand alone—harsh, arbitrary, unreasonable, and unnecessary.

The total departure of the second section from the scope of the act becomes apparent, beyond cavil, when we regard its sanitary features. A provision for the health of a particular neighborhood is not necessarily a provision which can enable a community to enjoy a general privilege. The section in question belongs properly, or should have been inserted originally, in the act creating the board of health, approved March 9, 1867. (Sess. Acts 1867,

p. 179.) Section 2 divests of power the board of water commissioners. To give them authority the act was passed, and grants power to the board of health, who have a different status, and labor for ends wholly foreign to those pursued by the first-named board. Surely a section which accomplishes this result does not contain a subject which is expressed in the title. The constitution of New York provided that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." In 1854 the legislature of New York passed an act entitled "An act to release the Fishkill and Beekman Plank Road Company from the construction of part of their road, and for other purposes." This act contained eight sections. The first was consistent with the title. The second and third contemplated an evasion of responsibility by the company in certain cases. The words "and for other purposes" are held to have no meaning, and the act is declared void as to all sections except the first. (*Fishkill v. Fish. & Beek. Pl. R. Co.*, 22 Barb. 634; see also 1 Seld. 285, 297.)

Now, the amendatory act of March 23, 1868, has a restricted title, if there ever was one in the history of legislation. Having read the original act, approved March 13, 1867, and having found that certain powers are exercised under it by certain officers, would any one imagine, from reading the title of the amendatory act, that it contained a section depriving such officers of authority in fact, and departing widely from the purpose of the original act? The provision of the constitution is not an idle measure. It was adopted by the people to put an end to a vicious system of legislation, which makes one act a cover for a number of different and inconsistent schemes. The objectionable features of the section in question may have escaped the attention of many members of the General Assembly—the title of the act being employed simply as the cover for a measure conferring upon a local board of officials extraordinary and dangerous powers.

The act under consideration purports to delegate a part of the legislative power to an inferior tribunal. It provides that "the parties who fail or neglect to comply with the provisions of this

section shall be subject to the same penalties as parties who use the water of the city and fail or refuse to pay the rate or assessment for the same." It is not contended here that the legislature has no authority to delegate to municipal corporations such legislative power as may enable them to regulate their municipal and police affairs and impose penalties for the violation of the regulations as made (*The State v. Simonds*, 3 Mo. 414); but it has clearly no authority to delegate to an inferior body the power to fix the penalty for an offense created by itself—which is exactly what is attempted to be done in the act before us—by making the penalty dependent upon the action of the city council, which may make it five dollars to-day, and five hundred dollars to-morrow.

"The legislative power shall be vested in a General Assembly, which shall consist of a senate and house of representatives." (Const. Mo. art. 4, § 1.) If it were conceded that the General Assembly has the power to vest either the city of St. Louis, or the board of water commissioners, or board of health, with authority to compel the citizens of the city to pay for the water from the city water-works under the circumstances set forth in the act, it would by no means follow that, having clothed either of these corporations with such power, it could delegate to another the authority to fix the penalty for disobedience to its orders. The power to impose a penalty for disobedience should accompany, as a necessary concomitant, the power to make the regulation. But in the case at bar the General Assembly has itself imposed the regulation, and none but itself can fix the penalty. The penal provision referring to the acts of another body to determine the punishment for a violation of a statute is therefore void.

The General Assembly has no authority to clothe either of the corporations before mentioned with the power to exact from the citizens so exorbitant and unjust a tax as that contemplated by the act under consideration. That it is a tax in support of the water-works system of St. Louis which is contemplated by this act, rather than the enforcement of a sanitary police regulation, is plainly apparent from the phraseology of the act itself. The

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action of the board of health (which is intrusted with the sanitary police powers of the city) is in no wise binding upon the board of water commissioners. It is not the board of health which "may require the proprietors" \* \* "to take out licenses for the use of water, etc.," but the board of water commissioners. Nor is it the use of the water from the city water-works that is made compulsory, but only the payment of a license for the use of such water. Under the act, as it now stands, no person can be punished for the use of water from any cistern or well, or for compelling the tenants in his house to use the same, no matter how thoroughly the board of health may be convinced of the deleterious quality of such water, provided he pays his license to the board of water commissioners. The preservation of the health of the citizens, by compelling them to use the water from the city water-works in lieu of what the board of health may deem injurious or unwholesome cistern or well water, is not the ultimate or paramount object of the act; for it neither secures this nor pretends to secure it. To ascribe such an object to this act would be to place a very low estimate upon the intelligence of the framers; but, if permitted to stand, it very effectually secures another object, to-wit: the payment of a water-tax into the city treasury, whether the person paying uses the water or not. If the legislature, then, intended to empower the board of water commissioners to levy a tax on all the proprietors of houses along such streets as they are ready to supply with water, it ought to be a uniform tax, according to the value of the property upon which it is levied. "All property subject to taxation ought to be taxed in proportion to its value" (Const. Mo. art 1, § 30); and it ought to be assessed upon all the property on such streets, not alone upon such as may be improved. "No property, real or personal, shall be exempt from taxation." (Const. Mo. art. 11, § 16.) The oppression and injustice which may be inflicted upon citizens under the operation of the act as it now stands is obvious. It is in violation not only of the constitution, but of every principle of justice and equality before the law, and ought not to be permitted to remain in force. (*Garrett v. City of St. Louis*, 25 Mo. 505.)

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced in the Police Court of the city of St. Louis by filing a complaint against the defendant claiming the sum of three hundred dollars for the violation of "An act of the General Assembly of the State of Missouri to amend 'An act to enable the city of St. Louis to procure a supply of wholesome water,' approved March 13, 1867," approved March 23, 1868.

The complaint stated in substance that at a specified date the defendant was the owner of a house situated on Broadway street, and that the board of health of the city had declared by resolution that the use of water from the public water-works of said city, in and for said house, was demanded as a sanitary measure for the preservation of the health of the inmates and inhabitants thereof; and that the defendant had failed and neglected to take out a license for the use of water in said house after the board of water commissioners had notified him of their readiness to supply the said house with water. And the action was instituted to recover the statutory penalty.

The statute on which the proceeding was based was an act amendatory of "An act to enable the city of St. Louis to procure a supply of wholesome water," which was approved March 23, 1868. (Adj. Sess. Acts 1868, p. 291.)

By the second section of the said amendatory act it is provided as follows: "The board of water commissioners of said city may, when and so soon as it is prepared to supply the said city or any part thereof with water, require the proprietors, owners, or lessees, or their agents, of houses, stores, and other buildings in the said city, or in such parts thereof as it is ready to supply as aforesaid, to take out license for the use of water for such house, store, or building, according to the rates and assessments as fixed by ordinance of the city for the use of water; and the said rate and assessment shall be payable by all such proprietors, owners, or lessees, or their agents, as well by those who consent as by those who refuse to place in their houses, stores, and buildings the water-pipe to receive the same, and shall be payable whenever the said



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board of water commissioners shall have notified the proprietor, owner, lessee, or his or her agent, of the readiness of said board to supply such house, store, or building, with water as aforesaid. The parties who fail or neglect to comply with the provisions of the section shall be subject to the same penalties as parties who use the water of the city and fail or refuse to pay the rate or assessment for the same; *provided, however*, that this section shall not have force or effect unless the board of health of the city of St. Louis shall, in the first instance and in every case, first, by resolution duly passed, have declared that in its judgment the use of water from the public water-works of the city, in any such house, store, or building, is demanded as a sanitary measure for the preservation of the health of the inmates or inhabitants of such house, store, or building."

Judgment was given against the defendant in the Police Court, and he appealed to the Criminal Court. In the latter court a motion was filed to dismiss the cause; first, because the Police Court has no jurisdiction over the same; secondly, because the act of the General Assembly under which the proceeding was instituted was void as to the section relating to this case.

This motion was sustained, and the plaintiff prosecuted her writ of error.

I will consider the above points transversely from the order in which they are stated. It is contended with great zeal that the second section of the amendatory act is unconstitutional and void, as being in violation of the thirty-second section of the fourth article of the constitution of this State, which declares that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed." It is said that the section treats of a subject entirely distinct and independent from any matter indicated by the title, inasmuch as it purports to confer new and very singular powers on the board of health and board of water commissioners.

The constitutional clause is new with us, though it has been adopted in many of our sister States.

The general scope of the inhibition may well be inferred, when we glance at the history of legislation and scan the character of many of the bills that have been passed in legislative bodies. It was intended to prevent surprise or fraud upon the members of the legislature by means often resorted to in the provisions of bills, of inserting matters of which the title gave no intimation; and also to effectually stop the vicious and corruptive system familiarly known as "log-rolling."

The practice of comprising in one bill subjects of a diverse and antagonistic nature, in order to combine in its support members who were in favor of particular measures, but neither of which measures could command the requisite majority on its own merits, was found to be not only a corrupting influence in the legislature itself, but destructive of the best interests of the State. But this was not more detrimental than that other pernicious practice by which, through dexterous and unscrupulous management, designing men inserted clauses in the bodies of bills, of the true meaning of which the titles gave no indication, and by skillful maneuvering urged them on to their passage. These things led to fraud, surprise, and injury, and it was found necessary to apply a corrective in the shape of a constitutional provision. But while the clause was embodied in the organic law for the protection of the State and the legislature, it was not designed to be unnecessarily restrictive in its operation, nor to embarrass legislation by compelling a needless multiplication of separate bills. It was only the intention to prevent the conjoining in the same act of incongruous matters and of subjects having no legitimate connection or relation to each other. If the title of an original act is sufficient to embrace the provisions contained in an amendatory act it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. (*Brandon v. The State*, 16 Ind. 197.)

Since the adoption of the constitution there has been but one case in this court involving the question here presented, and that was the case of *The State ex rel. Hixon v. Lafayette County*, 41 Mo. 39. There the legislature had passed an act entitled "An act to provide for appeals in contested election cases," and the

eighth section undertook to give the right of appeal in all other civil cases. This, we held, was inoperative and void, as being in contravention of the plain meaning and import of the constitution. It will be perceived that there was in the act no connection or congruity between the subject of appeals in contested elections and appeals in other civil cases. The title furnished no intimation, and no person seeing the title would naturally expect to find any provision in regard to appeals in other civil cases. In Texas, where the same provision substantially exists, the courts give it a liberal construction, and it has been decided that an act which was entitled "to regulate proceedings in the County Court," and gave an appeal from the County Court to the District Court, and regulated proceedings therein, was not within the mischief contemplated by the constitution, and the act was valid. (*Murphy v. Menard*, 11 Texas, 673.)

In New York, the Court of Appeals say: "There must be but one subject; but the mode in which the subject is treated and the reasons which influenced the legislature cannot and need not be stated in the title, according to the letter and spirit of the constitution."

In Iowa, the Supreme Court say that, in determining what laws shall be valid under this clause, "the unity of object is to be looked for in the ultimate end designed to be attained, and not in the details leading to that end." (*The State v. County Judge*, etc., 2 Iowa, 280.)

In Michigan, it has been accordingly held that the title of "An act to establish a police government for the city of Detroit" was not objectionable for its generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxation for its support and courts for the examination and trial of offenders, might constitutionally be included in the bill under this general title. It was said that, under any different ruling, "the police government of a city could not be organized without a distinct act for each specific duty to be devolved upon it, and these could not be passed until a multitude of other statutes had taken the same duties from other officers before performing them." And these several statutes, fragmentary as they must necessarily be, would often fail of the

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intended object, from the inherent difficulty in expressing the legislative will when restricted to such narrow bounds. (*People v. Mahaney*, 13 Mich. 495; *Morford v. Unger*, 8 Iowa, 82; *Whiting v. Mount Pleasant*, 11 Iowa, 482; *Supervisors v. People*, 25 Ill. 181; *Clinton v. Draper*, 14 Ind. 295; *Successors of Lanzetti*, 9 La. An. 329.) The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it. (*Ind. Cen. R. R. Co. v. Potts*, 7 Ind. 681; *State v. Powers*, 14 Ind. 195.) It is very plain, however, that the use of the words "other purposes," which have been extensively used in the title to acts to cover any and every thing, whether connected with the main purpose indicated by the title or not, can no longer be of any avail. (*Town of Fishkill v. Fishkill & Beekman Pl. R. Co.*, 22 Barb. 642; *Ryerson v. Utley*, 16 Mich. 269.)

If the legislature has seen proper to make the title restrictive, the courts have no authority, by mere construction, to enlarge it or make it more comprehensive. Thus: "An act concerning promissory notes and bills of exchange" provided that all promissory notes, bills of exchange, or other instruments in writing for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other stipulations therein mentioned, should be negotiable, and assignees of the same might sue thereon in their own names; it was held that this act was void as to all the instruments mentioned therein except promissory notes and bills of exchange. (*Menwhertin v. Price*, 11 Ind. 199.) It is perfectly obvious that it would have been easy to have formed a title that would have embraced them all. This subject is well considered by Judge Cooley in his recent work on *Constitutional Limitations*, p. 141.

In the act to which the section under consideration is amendatory, the title is "To enable the city of St. Louis to procure a supply of wholesome water." To accomplish that object it was necessary to act through agents, and hence a board of water com-

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missioners was constituted ; and, as a consequence, their powers, duties, and responsibilities, were defined. That the board of health should say when in their judgment it was necessary as a sanitary measure that certain houses should be supplied with water, does not alter the case. They take no steps toward carrying out the act, nor do they exert any active agency in the matter. When their views are made known, the board of water commissioners then act, if they see proper. The section, although it confers extraordinary powers, relates clearly to the subject intimated in the title, and is entirely congruous and connected with it. Every person, upon an inspection of the title, would naturally expect to find the full scope of the powers, duties, and privileges of the commissioners set forth in the act. In my opinion the law is unobjectionable, and the point is not well taken.

The next question raised concerns the jurisdiction of the Police Court. The law establishing that court provides that the police justice shall have the same jurisdiction as a justice of the peace, within the city limits, in all State cases. He shall have jurisdiction over all cases arising under any ordinance of the city, and in all cases of assault and battery arising within said city, subject to appeal, etc. (Sess. Acts 1867, p. 69, par. 18.)

The record shows that this is not a case in which a justice of the peace would have had jurisdiction, nor is it for a violation of a city ordinance, as the complaint shows on its face that it was for an alleged violation of an act of the legislature. The police Court is a court of limited jurisdiction, not proceeding according to the course of the common law ; and nothing is better settled than that such courts must confine themselves strictly within the authority given. For this reason the judgment of the court below will be affirmed. Another point was raised in the argument by defendant's counsel, viz : that the legislature cannot constitutionally grant the power to the board of water commissioners to compel persons to pay for water whether they used it or not. It is placed upon the ground of a sanitary regulation, and the provision has been virtually adopted in other States ; but the point was not strongly pressed, and I have forborne discussing it.

Judgment affirmed. The other judges concur.



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Morse v. Rathburn.

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JOHN H. MORSE, Plaintiff in Error, v. GEORGE R. RATHBURN,  
Defendant in Error.

1. *Contracts—Stipulations—Penalties—Liquidated Damages.*—Plaintiff made an agreement in writing with defendant, concerning the sale of certain lands, by the terms of which nine thousand dollars of purchase money was to be paid at a day and place named, and two notes to be given in the sum of six thousand dollars each, payable in one and two years from date—payment of the notes to be secured by deed of trust on the land. On the payment of the purchase money and the execution of the notes and deed of trust, plaintiff was to give defendant a warranty deed for the property. The agreement further stipulated that “either party failing to comply with its provisions shall forfeit and pay to the other the sum of two thousand dollars.” *Held*, that this stipulation should be treated as one for liquidated damages, and not one for a penalty.
2. *Contracts—Stipulations—Liquidated Damages.*—Where the parties have agreed that, in case one of them shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of damages sustained by such omission, courts will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages; *provided*, that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury.
3. *Contracts—Stipulations—Penalties—Liquidated Damages.*—When an agreement contains several distinct covenants on which there may be diverse breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, then the contract will be treated as one for a penalty, and not for liquidated damages. But where the parties to a contract, in which the damages to be ascertained growing out of it are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, in language plainly expressive of such agreement, and when the intention is plain and palpable, there is no law to justify the courts in giving the contract a different construction.

*Error to Second District Court.*

*Abner Green*, for plaintiff in error.

I. The proviso of forfeiture in the bond goes to the whole contract—not to any trivial, unimportant stipulation or covenant therein. If it did, the sum, perhaps, might be regarded as a penalty. But the parties show by the very terms of their agreement that they intend to fix the amount to be paid for a failure to carry out and perform a stipulated act, viz: the whole contract. And this is in a case “where the damages resulting from the

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non-performance of the contract are uncertain, and cannot be admeasured with any degree of accuracy ;" therefore (it has been decided) "such sum agreed to be paid by the party in default will be regarded as liquidated damages." (Watts v. Sheppard, 2 Ala. 425 ; 2 Story's Eq. p. 774, § 1318 ; 1 U. S. Dig. p. 513, § 316.)

II. It is a rule in law that "it is not allowable to interpret what has no need of interpretation." (Chitty on Cont. 99.) "Nor will the law make an exposition against the express words and intent of the parties." (Broom's Leg. Max. 266.) In the contract before the court there can be no doubt as to the meaning and intent of the parties, and no court of law or equity can create a contract for them where there is no room for two constructions as to their meaning. (2 Story's Eq. p. 774, § 1318 ; *id.* §§ 1321, 1323, 1324 ; Pearson v. Williams, 24 Wend. 244 ; 26 Wend. 630 ; Kemble v. Farren, 6 Bing. 141.)

The following cases are submitted, as being precisely in point, to show that, in a contract like the one before the court, the sum agreed to be paid as a forfeiture is not to be construed as a penalty, but as liquidated damages. (Chamberlain v. Bagley, 11 N. H. 234, referred to in 1 U. S. Dig. p. 512, §§ 307, 308, 316, 319 ; Gammon v. Howe, 2 Shepley, 250.)

*J. L. Thomas, and Fisher & Rowell, for defendants in error.*

I. The sum of money specified in the written agreement read in evidence by plaintiff is a penalty, and not liquidated damages. If damages, the parties would have said so. See the case of Dennis v. Cummins, 3 Johns. Ch. Cas. 297, a case exactly like the one at bar. This was also a contract for the sale of land, and contained the following clause: "And it is further covenanted, in and by the said agreement by and between the said parties, that, in case of failure to fulfill the aforesaid agreements or covenants on the part of either of said parties, the party not fulfilling the said agreement shall forfeit and pay to the other party who shall fulfill the said agreement the sum of two thousand dollars damages." The court decided that the two thousand dollars was a penalty, and not liquidated damages. The law is very clear that, where the

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damages are of such a nature that they can be ascertained by a jury, the amount stated by the parties as damages shall be considered as a penalty, and the aggrieved must declare and prove the damages he has sustained. And this is so although the parties state that the amount specified is "liquidated damages." (2 Story's Eq. Jur. p. 540, § 1318; *Kemble v. Farren*, 6 Bing. 141; *Bagley v. Reddis*, 5 Sandf. 192; *Moore & Hunt v. Platte County*, 8 Mo. 467; *Gower v. Saltmarsh*, 11 Mo. 271; *Basye v. Ambrose*, 28 Mo. 39.) In this last case the court reviewed the law at great length, and laid it down as stated in the proposition above.

WAGNER, Judge, delivered the opinion of the court.

On the 7th day of February, 1867, by an agreement in writing, Morse sold to Rathburn his farm in Jefferson county for the sum of twenty-one thousand dollars. By the terms of the agreement nine thousand dollars was to be paid on the 1st day of April, 1867, at the office of Bogy & Fry, in the city of St. Louis, and for the remainder of the purchase-money Rathburn was to execute his two several promissory notes for six thousand dollars each, payable in one and two years respectively, with six per cent. interest from date.

The payment of the notes was to be secured by the execution of a deed of trust on the land. Upon the payment of the money and the execution and delivery of the notes and deed of trust, Morse was to make, execute, and deliver a good and sufficient warranty deed for the real estate. The agreement contained this further stipulation: "And the said parties to this agreement bind themselves that either party failing to comply with its provisions shall forfeit and pay to the other the sum of two thousand dollars." Morse, at the appointed time, presented his deed and tendered a compliance with his part of the contract, but Rathburn refused to comply or execute it on his part, and this action was instituted to recover the two thousand dollars — the plaintiff contending that it was agreed on between the parties as liquidated or stipulated damages. The Circuit Court refused to give it this construction, and held that it was a penalty, and that the plaintiff

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could only recover such damages as he could show by evidence that he was entitled to by reason of the breach. This view of the subject was also entertained by the District Court, and the plaintiff has brought the case here by writ of error.

It is perfectly competent for parties, when entering into an agreement, to avoid all controversy as to the amount of damages which may result from a violation of the contract, and to agree upon a fixed, certain, and definite sum which shall be paid by the party in default. The damages in such a case are termed liquidated, stipulated, or stated damages. But in such cases great difficulty has been experienced in giving the contract a practical application and construction in determining whether the damages should be regarded as liquidated, or as a mere penalty only. The question is environed with doubt and contradiction, and the decisions are conflicting and inharmonious. Mr. Sedgwick, the learned author of the *Treatise on Damages*, says: "The subject matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained and doing justice between the parties."

Judge Story says that "the general principle adopted is that whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case the general test by which to ascertain whether relief can or can not be had in equity is to consider whether compensation can be made or not. But the writers all concur that, where the parties have agreed that in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate, and

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conventional amount of damages sustained by such act or omission, courts will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages; provided that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury.

Where an agreement was entered into by the defendant to perform for the plaintiff at his theater, and attend all rehearsals, or pay the established fines for all forfeitures of any kind whatsoever, with a clause that either of the parties neglecting to perform the agreement should pay the other £ 200, and the declaration averred a refusal to perform—plea, non-assumpsit—on trial, a verdict was had for £ 20, with leave to the plaintiff to enter a verdict for £ 200 if the court should consider the agreement one in the nature of liquidated damages. Here it will be seen that the phrase *liquidated damages* was not used, and that if the sum of £200 was not construed as a penalty merely, the non-payment of any one of the fines would have forfeited the whole amount. Lord Eldon, then Lord Chief Justice of the Common Pleas, in delivering the judgment of the court, said that he “had felt much embarrassment in ascertaining the principle of the decisions,” and that “this appeared to him the clearest principle: that where a doubt is stated, whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument in case the act intended to be prohibited be done, that sum shall be construed to be a penalty, though the mere fact of the sum being apparently enormous and excessive would not prevent it from being considered as liquidated damages.” He added further: “*Prima facie*, this certainly is contract, and not penalty, but we must look to the whole instrument,” and it was held a penalty. (*Astley v. Weldon*, 2 Bos. & Pul. 346.)

The doctrine laid down in *Astley v. Weldon* was applied in a subsequent case (*Kemble v. Farren*, 6 Bing. 141) to a very similar state of facts. The defendant had agreed with the plaintiff to act as principal comedian at Covent Garden, and to conform to its rules; the plaintiff to have £3 6s. 8d. every night that



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the theater should be open. And the agreement contained a clause that if either party failed to fulfill his agreement, or any part thereof, or any stipulation therein contained, such party should pay the other the sum of £1,000; to which sum it was agreed that the damages should amount, and which sum was declared by the parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. The breach alleged was a refusal to act during the second season, and the jury gave a verdict for £750. A motion was made to increase this verdict to £1,000, on the ground that that sum was the amount liquidated by the parties; but it was denied. Tindal, C. J., delivered the opinion of the court, and his remarks contain such a full and precise exposition of the doctrine which has been followed in other cases that we will transcribe a portion of them:

“It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement—the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought that it would have had the effect of ascertaining the damages upon any such breach at £1,000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing out that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand the defendant had refused to conform to any usual regulations of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that

the former should be considered a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury; but we can only say, if such is the intention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case in principle from that of *Astley v. Weldon*, in which it was stipulated that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200. to be recovered in his Majesty's Courts at Westminster."

The doctrine in this case has been repeatedly recognized, and its reasoning was applied and enforced in this court in the case of *Basye v. Ambrose*, 28 Mo. 39, where the defendant Ambrose bound himself in the sum of one thousand dollars to Basye and Bachman as liquidated damages, and not as a penalty, in consideration of certain acts to be performed by them, to go with them to California to dig for gold. He, on his part, stipulated to do and perform many acts, some of them very trivial and unimportant in their nature; and he obligated himself, in case of failure to comply with his contract, to pay Basye and Bachman one thousand dollars as liquidated damages, and, in the event of their receiving damages over that sum, he was to pay whatever damages they might sustain; but in no event were the damages to be less than one thousand dollars. Here the one thousand dollars was to be paid for the breach of any one of the conditions, without regard to how trifling it might have been, or whether Basye and Bachman suffered any injury in consequence thereof or not, and notwithstanding that the damages might have been susceptible of easy and exact ascertainment by evidence before a jury. It was held that the whole scope and tenor of the instrument showed that the stipulation was designed as a penalty, and not stated damages.

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To the same effect see *Hammer v. Breidenbach*, 31 Mo. 49; *Moore v. Platte County*, 8 Mo. 469; *Gower v. Saltmarsh*, 11 Mo. 273; *Daily v. Litchfield*, 10 Mich. 29; *Lampman v. Cochran*, 16 N. Y. 275; *Lord v. Gaddis*, 9 Iowa, 235; *Hallock v. Slater*, *id.* 599; *Higginson v. Weld*, 14 Gray, 165.

The general rule may be formally stated that when the agreement contains several distinct covenants, on which there may be divers breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, then the contract will be treated as one for a penalty, and not for liquidated damages. In some instances it has been decided that from the very excessiveness and disproportion of the damages to the injury sustained, a penalty was inferable, instead of liquidated damages. Thus, in *Dennis v. Cummins*, 3 Johns. Ch. Cas. 297, the parties contracted for an exchange of lands, and the plaintiff agreed to let the defendant have seven hundred acres of land, in the county of Ontario, at the appraisal of men, in part payment for a farm which the defendant agreed to sell the plaintiff, lying in the county of Columbia, valued at three thousand seven hundred and fifty dollars. The agreement, after mentioning the terms of exchange, contained the following covenant: "And it is further covenanted, in and by the said agreement by and between the said parties, that, in case of failure to fulfill the aforesaid agreements or covenants on the part of either of said parties, the party not fulfilling the said agreements shall forfeit and pay to the other party who shall fulfill the said agreement the sum of two thousand dollars damages." The court held that it was a penalty—*Thompson, J.*, saying: "If recurrence be had to this agreement, it never can be presumed that the parties had the sum in view as the measure of damages; for the full value of the defendant's property which was to be exchanged was only three thousand seven hundred and fifty dollars; and the value of the plaintiff's considerably less. It would be a strange construction to suppose that the damages, on a failure in fulfilling such a bargain, should be two thousand dollars." But in the same court, where the defendant covenanted to assign to the plaintiff a lease, and to deliver possession thereof, with the following provision—

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“And I further covenant that, in case of non-performance of any or either of the above covenants, I will forfeit the sum of five hundred dollars, as the liquidated damages, to the said Knapp”—it was said: “It is a clear case of liquidated damages, if it is in the power of the party to liquidate them.” (Knapp v. Maltby, 13 Wend. 587; Pearce v. Williams, 24 Wend. 244; Hasbrouck v. Tappan, 15 Johns. 200; Reynolds v. Bridge, 6 El. & Bl. 528; Cotheal v. Talmage, 9 N. Y. 551; Clement v. Cash, 21 N. Y. 253; Dunlap v. Gregory, 10 N. Y. 241.) Where a bond was given by the plaintiff to the defendant, conditioned that certain work should be done by himself and another party for a certain sum within six weeks, and if not they would “forfeit and pay” a designated amount for every week till it was finished, Buller, J., declared that it was as strong a case of liquidated damages as could exist. (Fletcher v. Dyche, 2 T. R. 32.) In Cheddick’s Ex’r v. Marsh, 1 Zabriskie, 463, it was held that when a party to an agreement contracts, upon a given event, to “forfeit and pay a certain sum of money, the natural and legal import of the terms renders that sum stipulated damages or compensation, and not a penalty, unless a contrary intention is to be inferred from other parts of the agreement. In Streeper v. Williams, 48 Penn St. 450, a hotel owner agreed to sell it for fourteen thousand dollars (of which three thousand dollars was to be paid at a specified time, when a deed was to be signed), part possession to be delivered immediately; and in the contract the parties agreed to forfeit five hundred dollars in case either failed to comply with its terms: *held*, that the forfeiture was intended by the parties as a compensation to either, in case the other wholly abandoned the contract, and that it was liquidated damages and not a penalty.

In the case of Clement v. Cash, *supra*, the consideration for the premises sold was nine thousand dollars, and the contract required the plaintiff to pay four thousand dollars on the first day of April, 1855; to assign two mortgages, one for three thousand seven hundred and thirty-seven dollars, and the other for one thousand dollars; to convey to the defendant a house and lot, and to deliver to him two promissory notes to be made by the

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plaintiff, with a good indorser, for five hundred dollars ; all which acts were to be performed on the first day of April, 1855, on which day the defendant was to execute a conveyance to the plaintiff of the land specified ; and in default by either party, the one complying with his contract was to recover two thousand dollars as liquidated damages. In a very thorough discussion of the question, the court declared that the contract, in legal effect, provided but for the performance of a single transaction on each side, and at the same period of time, viz: the execution and delivery of a deed of the land by the defendant, and payment therefor by the plaintiff ; that the defendant agreeing to receive in payment for his deed and the plaintiff to pay, simultaneously with its delivery, the consideration in money and other property, could not divest what was to be done of the character of a single transaction. And it was accordingly adjudged that there was nothing unconscientious in enforcing the agreement made by the parties themselves, and that the damages were compensatory, and not to be regarded as a penalty.

Where the parties to a contract, in which the damages to be ascertained growing out of a breach are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, in language plainly expressive of such agreement, and when the intention is plain and palpable, there is no law, that I am aware of, to justify the courts in giving the contract a different construction or saying that the parties meant something else. Where the sum fixed is greatly disproportionatèd to either the actual or presumed damage, showing that one side was the victim of oppression, a court exercising equity powers would interfere. But no such facts are exhibited in this case. The agreement and the matters and things to be performed by the respective parties constitute essentially one entire transaction.

The loss resulting from non-performance on either side was vague and uncertain, and insusceptible of any precise or accurate ascertainment. Morse, relying on the execution of the contract in good faith, may have purchased other property, or made arrangements to invest the money arising from the sale of his land in other business. Now, it is evident, and every one can see



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the difficulty there would be in attempting to reach the real damage which men must necessarily suffer from disappointment in their plans; and many of the subjects of loss or damage cannot even be given in evidence. An accurate account can scarcely be stated in dollars and cents; and in a contract of the magnitude of the one in controversy but few would place the estimate lower than the amount agreed upon by the parties in case of total abandonment. If interference were justified on the ground that the sum named was oppressive or grossly disproportionate to the real injury, such disproportion is certainly not apparent in this case.

This case seems to have been tried in a very summary manner in the Circuit Court, and no evidence was introduced or admitted in regard to a certain defense set up in the answer. It may safely be assumed that the expression of opinion by the court in regard to the nature of the damages, before the cause was really submitted, suspended the necessity of the defendant availing himself of the question of misrepresentation which he alleged was practiced upon him by the plaintiff. As the cause will be remanded, if there is any merit in the defense the defendant will be entitled to the full benefit of it.

The judgment will be reversed and the cause remanded. The other judges concur.

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## A

### ACTIONS.

See PRACTICE, CIVIL.

### ADMINISTRATION.

1. *Administration — Partnership Estates — Appeal — What bond required.* —

A surviving partner administering on partnership effects has all the rights, incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.)—Bruening v. Oberschelp, 276.

2. *Administration — Debts from Administrator to Testator, when Assets.* —

Where a banking house issued a certificate of deposit to one who afterward died, and a member of the banking house became administrator, the debt evidenced by the certificate will be considered assets in his hands, within the meaning of the twenty-eighth section of the second article of the act concerning administrators, even though the certificate never came into his possession. (R. C. 1855, p. 133; Gen. Stat. 1865, p. 492, § 31.) And it is immaterial that the debt was a partnership one, as, under the laws of this State, each member is liable individually for the obligations of the firm.—Dubois's Adm'r v. Walsh, 272.

3. *Probate Court — Appeals — Bonds — Judgment against Securities.* —

The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court.—*Id.* 273.

4. *Administration — Set-off against suit of Administrator, when admissible.* —

The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.—Shanon's Adm'r v. Dinan, 269.

## ADMINISTRATION—(Continued.)

5. *Administration—Payment of debts—Claims of heirs for shares in Estate, when brought.*—Before heirs have any right of action against the administrator for their distributive share of the estate, the debts against the estate must not only be paid, but distribution must be ordered by the appropriate tribunal.—*Id.*
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## AGENCY.

1. *Agents of Corporations—Simple Contracts—Agency.*—The conveyance of real property must purport to be made and executed by the corporation acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.—*Musser v. Johnson, 74.*
2. *Married Women—Separate Real Estate—Agents—Contract made by—Liability of Third Persons to Principal for.*—Although land belongs to a *femme covert* in her sole individual right, it is undoubtedly true that her husband is seized with her in the possession, and she must be held to be acting as his agent. But a man may delegate an agency to his wife, as well as to any other person; or he may ratify her acts as agent, although done without previous authorization. And an agent may make a contract in his own name, whether he describes himself as an agent or not, and his principal will be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit was given to the agent and it was intended by both parties that no resort should in any event be had by or against the principal upon it.—*Grant v. White, 286.*

## AGENCY—(Continued.)

3. *Foreign Insurance Companies—Agents.*—Foreign insurance companies are bound by the acts of their local agents, acting within the scope of their general authority, without any immediate knowledge of the transaction on the part of the company.—*Franklin v. Atlantic Ins. Co.* 456.

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## ASSIGNMENTS.

1. *Assignment—Non-resident Creditors—Conflict of Laws.*—Comity does not require a court to enforce a contract valid according to the laws of the place where it is made, if such enforcement would result to the manifest injury or detriment of the citizens of the country where the property is situated or the claim attempted to be enforced. But where all parties to a suit are residents of another State, and defendants had made an assignment of their property, in accordance with the laws of that State, for the benefit of their creditors, and an assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of and residing in that State, could not secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvent in this State.—*Thurston v. Rosenfield*, 474.
2. *Partnership—Assignment—Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.—*Kitchen v. Reinsky*, 427.
3. *Fraudulent Conveyances—Assignments—Secret Preferences.*—In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction, and be communicated to the other creditors and they do not object.—*Sullivan's Adm'r v. Collier White Lead and Oil Company*, 397.
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## ATTACHMENTS.

1. *Garnishment—Trustee—Rents.*—Where one, as agent, collected rents for the trustee of another, and was garnished as debtor of the beneficiary, according to the decision of this court in the case of *McIlvaine v. Smith* (*ante*, p. 45), these rents were a trust fund in the hands of the trustee until paid over by

**ATTACHMENTS—(Continued.)**

him to the beneficiary, and the agent could not be made liable under this process, as the debtor of the beneficiary, for rents so collected as the agent of the trustee.—*McIlvaine v. Lancaster*, Garnishee, 96.

2. *Attachment—Order of Publication—Sufficiency.*—The order of publication required by the attachment act of 1855 (R. C. 1855, p. 246, § 23) did not itself operate an attachment, but was intended to impart notice to defendant of the pending attachment. And a publication notifying defendant that his property is "about to be attached," is sufficient, within the meaning of the statute.—*Harris v. Grodner*, 159.
3. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*—Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.—*Kitchen v. Reinsky*, 427.
4. *Partnership—Assignment—Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.—*Id.*
5. *Attachment—Plea in Abatement—Answer.*—Where, in a suit by attachment, defendant pleads in abatement, and the issue is found in his favor, and he afterward answers, setting up the defense that neither plaintiff nor defendant resided in the county in which the suit was brought, the ruling of the court in causing the same to be stricken out was erroneous. Under the 42d section of the present attachment act (Gen. Stat. 1865, p. 567), the suit should have been proceeded upon to final judgment as though commenced by summons alone; and in suits so commenced, one of the parties must reside in the county where suit is brought in order to confer jurisdiction. (Gen. Stat. 1865, p. 658, § 1.) Hence, the answer, if true, was a complete bar to the action.—*Peery v. Harper*, 131.

See ASSIGNMENTS, 1. FRAUDULENT CONVEYANCES. PRACTICE, CIVIL. TRIALS, 14.

**AUDITOR, COUNTY.**

1. *County Auditor—Claim against County, how allowed.*—No authority is conferred upon the county auditor in any case to draw a warrant upon the county treasury; nor is his opinion conclusive to the court upon the correctness of any claim against the county. All warrants upon the treasury must be ordered by the court itself.—*State ex rel. McNeil v. County of St. Louis*, 496.
2. *Account for Services, etc., how allowed against Circuit Court—Construction of Statute.*—An account for services in attending the Circuit Court of St. Louis county, and for stationery furnished thereto, should be audited and allowed by the Circuit Court, under the provisions of the general law relating



## AUDITOR, COUNTY—(Continued.)

to this subject. (Gen. Stat. 1865, p. 540, §§ 41-2.) The special law relating to county auditor (Adj. Sess. Acts 1859, p. 448) has no application to claims of this character.—*Id.*

## B

## BILLS AND NOTES.

1. *Promissory Note — Equitable Defenses — Parol Contract.*— Where the answer to a suit on a promissory note denied the consideration implied by the use of the words "value received" in the body of the note, and the evidence tended to show a special contract between the maker and payee, at the time of the execution of the note, by which the former was to have a definite time to ascertain the value of a certain patent for which the note was given, and the evidence further tended to show that the patent was of no value whatever, such evidence constituted a good defense to the note sued on.—Benton v. Klein, 97.
2. *Promissory Note — Place of Payment — Alterations.*— Where words designating place of payment on a promissory note are not incorporated in the body of the contract itself, nor in any manner annexed to the instrument by the maker for the purpose of fixing a place of payment, they are to be taken as a mere memorandum, and therefore immaterial. In a contest between holder and indorser, such an addition or memorandum, without the knowledge and consent of the latter, has been held sufficient to discharge him. As to the maker, the rule of law goes to the extent that he is generally and universally liable, and demand at a place designated in the note is not a condition precedent of payment.—American National Bank v. Bangs, 450.
3. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.*— Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for one thousand dollars, and in pursuance of this arrangement the property was conveyed to defendants: *Held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker, notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.—Kratz v. Stocke, 351.
4. *Contracts, executed and executory.*— Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.—*Id.*
5. *Deeds of Trust — Notes — Priority of Payment — Special Contract.*— The principle of law that, where a deed of trust secures several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in which they mature, can have no application to a case where the parties have specially agreed that payments shall be made transversely, and that the note

## BILLS AND NOTES—(Continued.)

last falling due shall have the priority of lien. And it does not alter the case that, by a provision of the deed, the grantor was expressly authorized to pay off the note first maturing at any time. This provision does not empower him to use the property encumbered by the trust for that purpose, without the consent or approbation of the securities upon the last maturing note.—*Lamme's Adm'r v. Lamme*, 153.

6. *Promissory Note—Verdict—Judgment.*—In an action upon a promissory note, where the answer simply denied the execution of the note, and the cause was submitted to the jury, it was their duty, under the provisions of Gen. Stat. 1865, chap. 169, §§ 21, 26, not simply to find a general verdict for plaintiff, but also to assess the amount due upon the judgment; and the court is not authorized to invade the province of the jury, and, in case of a general verdict by them, to proceed to ascertain the amount due upon the note and render judgment thereon.—*Snadon's Adm'r v. Nickell*, 169.

7. *Trial—Petition—Notes, treated as evidence of debt—What time given defendant to answer.*—Where the cause of action set out in the petition was for work and labor done, with a separate statement of the amount of each account, coupled in every case with reference to papers attached to the petition in the following form: "as will more fully appear by the evidence of indebtedness herewith filed"—it was immaterial to inquire whether these "evidences of indebtedness" were, in point of fact, notes for the direct payment of money or not. Plaintiff having elected to declare upon the original cause of action in this manner, defendant was entitled to six days within which to plead; and the court will, on motion at a subsequent term, the irregularity being shown to its satisfaction, set aside a judgment given for plaintiff within that time, or do whatsoever the justice of the case may require.—*Smith v. Best*, 185.

## BOATS AND VESSELS.

1. *Boats and Vessels—Lien.*—Decision in *Cavender v. Str. Fanny Barker*, 40 Mo. 235, affirmed.—*Joyall v. Str. Goldfinch*, 455.

## BRIDGES.

Per HOLMES, Judge.

1. *County Bridges—Statute—Common Law Remedies.*—The mode of compensation to owners of lands adjoining county bridges, prescribed by the twenty-first section of the chapter concerning bridges (Gen. Stat. 1865, p. 299), must be held to be exclusive of common law remedies.—*Schmidt v. Densmore*, 225.

2. *County Bridges—Statute, what authority given by.*—The authority to take rock and timber from adjoining private lands, conferred by that section, is broad enough to embrace all the specified cases of building and repairing county bridges.—*Id.*

3. *County Bridges—Commissioner—Contractor—Agency, how given.*—The County Court, the commissioner, and the contractor or undertaker, were all alike the agents of the county, and derived their powers and authority from the provisions of the law. The commissioner could not only take the necessary materials for building the bridge, in person, but he might cause them to be taken by his proper agents. And it was not necessary that the authority should be given by express words in the contract. It resulted from the very nature of the employment.—*Id.*

## BRIDGES—(Continued.)

4. *Trespasses—Act concerning, contemplates what.*—The act concerning trespasses (Gen. Stat. 1865, ch. 76, § 1) contemplates voluntary or willful trespasses only, which are committed without any lawful right, and it inflicts penalties as upon a wrong-doer.—*Id.*
  5. *County Bridges—Materials for building, how may be taken under Statute.* The clause in a contract between a county commissioner and a contractor for building a county bridge, which provides that said contractor was "to furnish all the material required for said bridge," does not exclude the authority conferred by the statute to procure these materials by taking them from the adjoining lands, in case they could not be purchased elsewhere. If such an agreement divested him of the powers conferred on him by statute through the County Court and the commissioner, and by virtue of the agency created by the contract itself, it would be in contravention of the law, and would exceed the lawful authority of the commissioner, and would therefore be void.—*Id.*
  6. *County—Payment by, for material chargeable to contractor—How construed.*—The county being compelled by operation of law to pay money which by the terms of the contract the contractor was bound to pay, as between him and the county, it would amount to a payment made at his request and for his use.—*Id.*
- Per CURIAM.
7. *Eminent Domain, not given by implication.*—The power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language.—*Id.*
  8. *County Bridges—Statute—Construction.*—The twentieth and twenty-first sections of the chapter in relation to bridges (Gen. Stat. 1865) were intended to apply only to cases where the county commissioner either repairs or builds the bridge by the direct employment of some person, when the contractor has failed to comply with his covenants, and have no application to the original contractor; and in that case the county pays for the materials and recovers their value, as well as the price paid for the labor of repairing, from the contractor who is in default.—*Id.*

## C

## CARRIERS.

1. *Contracts—Bailments—Carriers—Exceptions to Liabilities—Practice.*—In an action against a carrier, the plaintiff is not bound to show negligence on the part of the carrier, in the first instance; all that is necessary to charge the carrier is to prove the delivery of the goods to him to be carried, and the burden of accounting for them is thrown upon him; and if he wishes to exonerate himself from liability, he must show either a safe delivery of the goods, or prove that the loss occurred by one of the causes excepted in his undertaking.—*Levering v. Union Trans. & Ins. Co.*, 88.
2. *Contracts—Bailments—Carriers—Exceptions to Liabilities.*—A carrier may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by mistake or accident; but he cannot exempt himself from

## CARRIERS—(Continued.)

losses caused by a neglect of that degree of diligence which the law casts upon him in his character of bailee. The obligation of the carrier does not originate in contract, but it is a duty the law imposes upon him in consideration of the nature of his employment; and if he assumes the calling, he has no power over the duties which the law annexes to that calling. It is the duty of a common carrier to receive whatever goods are offered to him for transportation in the usual course of his employment, and he cannot vary his liability by inserting conditions in his acceptance of goods. To have this effect there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, cannot be undermined and frustrated by the design and circumvention of artfully prepared printed receipts thrust upon the public, without the opportunity of fair assent, in the press and hurry of railroad travel.—*Id.*

3. *Contracts — Bailments — Common Carriers — What care required.*—The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the common carrier, although he may by his contract restrict his liability as insurer, is held to that different and higher degree of diligence commensurate with the duties he assumes.—*Id.*

See RAILROADS.

## CITY ORDINANCES.

1. *City Ordinance — Market Stand — Paving Contract — Who liable for — Construction of Statute.*—The city of St. Louis is not the "occupant" of that portion of a street which has been set apart by ordinance as a stand for market wagons during certain hours of the day, within the meaning of the ordinance relating to the engineer department (Rev. Ord. 1866, p. 329, § 21), and the owners of property fronting on portions of streets so set apart are liable to a contractor with the city of St. Louis, upon a certified tax bill, for cost of repaving the same.—*Bixler v. Hagan*, 367.
2. *City Ordinance — Paving Contract — City, when liable for as "occupant of property," etc.*—The city of St. Louis becomes chargeable for expense of repaving, "as owner or occupant of property," within the meaning of the twenty-first section of that ordinance, only when "owner or occupant" fronting upon the street sought to be repaved. (Same ordinance, § 18.)—*Id.*

See PRACTICE, CIVIL. PLEADINGS, 3, 4.

## CONFLICT OF LAWS.

1. *Assignment — Non-resident Creditors — Conflict of Laws.*—Comity does not require a court to enforce a contract valid according to the laws of the place where it is made, if such enforcement would result to the manifest injury or detriment of the citizens of the country where the property is situated or the claim attempted to be enforced. But where all parties to a suit are residents of another State, and defendants had made an assignment of their property, in accordance with the law of that State, for the benefit of their creditors, and an assignee had been appointed to collect and distribute the assets of the insolvents, one of the creditors, a citizen of and residing in that State, could not secure a preference over the remaining creditors in his own State by process of attachment against the property and assets of the insolvent in this State.—*Thurston v. Rosenfield*, 474.

CONSTITUTION.

1. *Constitution—Voters—Oaths.*—The case of *The State of Missouri v. Cummings*, decided in the Supreme Court of the United States, applies to all cases where the right to exercise any trade, calling, or profession, without taking the oath prescribed by the new constitution of Missouri, has been questioned, but not to the case of a voter. (*Blair v. Ridgley*, 41 Mo. 63, affirmed.)—*State v. Neal*, 119.
2. *State Convention—Powers.*—The framers of the new constitution had the authority to declare it in full force without making provision to submit it to the voters of the State; and their power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument, cannot be seriously questioned. The ordinance had in itself every element necessary to give it legal force and effect, and was, therefore, binding upon the voter.—*Id.*

CONSTITUTION OF THE UNITED STATES.

See REVENUE, 11, 12. CONSTITUTION, 1.

CONTRACT.

1. *Contract—Assignment.*—Where a contract does not stipulate for the personal services, knowledge, skill, and experience of another, but for work which might be done as well by a third person as by the contractor himself in person, such a contract may be assigned, and the assignee may recover upon it. (*Leahy v. Dugdale*, 27 Mo. 437, affirmed.)—*City, to use of Sullivan, v. Clemens*, 69.
2. *Contracts—Bailments—Carriers—Exceptions to Liabilities—Practice.*—In an action against a carrier, the plaintiff is not bound to show negligence on the part of the carrier, in the first instance; all that is necessary to charge the carrier is to prove the delivery of the goods to him to be carried, and the burden of accounting for them is thrown upon him; and if he wishes to exonerate himself from liability, he must show either a safe delivery of the goods, or prove that the loss occurred by one of the causes excepted in his undertaking.—*Levering v. Union Trans. and Ins. Co.*, 88.
3. *Contracts—Bailments—Carriers—Exceptions to Liabilities.*—A carrier may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by mistake or accident; but he cannot exempt himself from losses caused by a neglect of that degree of diligence which the law casts upon him in his character of bailee. The obligation of the carrier does not originate in contract, but is a duty the law imposes upon him in consideration of the nature of his employment; and if he assumes the calling, he has no power over the duties which the law annexes to that calling. It is the duty of a common carrier to receive whatever goods are offered to him for transportation in the usual course of his employment, and he cannot vary his liability by inserting conditions in his acceptance of goods. To have this effect there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, cannot be undermined and frustrated by the design and circumvention of artfully prepared printed receipts thrust upon the public, without the opportunity of fair assent, in the press and hurry of railroad travel.—*Id.*
4. *Contracts—Common Carrier, care required.*—The ordinary bailee for hire, or private carrier, is liable only for neglect of ordinary care; but the



## CONTRACT—(Continued.)

- common carrier, although he may, by his contract, restrict his liability as insurer, is held to that different and higher degree of diligence commensurate with the duties he assumes.—*Id.*
5. *Contracts, Executed and Executory — Covenants — Lands — Vendor and Purchaser.*—There is a distinction between the rules which govern the relation of vendor and purchaser before and after the execution of the deed. While the contract remains executory, the purchaser has a right to demand a title clear of all encumbrances and defects. The vendor cannot recover without exhibiting an ability to comply with the stipulations and agreements contained in his covenants. An agreement to make a good and sufficient warranty deed is an agreement for the conveyance of a good title.—*Wellman's Adm'r v. Dismukes*, 101.
6. *Contract — Acceptance — Mutual Assent.*—Where a city council passed an ordinance, first accepting a written proposal touching the erection of certain machine-shops, etc., and then providing the means for carrying out that acceptance, not merely or exclusively on the terms proposed, but "on such further conditions as may be deemed necessary," and further authorizing the mayor to enter into a written agreement relative to such proposition: *Held*, that the contract was not complete and could not be enforced against the city until its terms were fully agreed upon and the contract closed by writing. An absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time existed the requisite mutual assent to the same thing in the same sense.—*Eads v. Carondelet*, 118.
7. *Contract — Parol, must be put in writing, when.*—When a parol agreement is assented to, which it is understood between the parties is to be put into writing, it is not binding till it is put in that form.—*Id.*
8. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.*—Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for \$1,000, and in pursuance of this arrangement the property was conveyed to defendants: *Held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.—*Kratz v. Stocke*, 351.
9. *Contracts, executed and executory.*—Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.—*Id.*
10. *Contract — Endowment — Subscription.*—An agreement to contribute to an endowment fund when a certain sum of money is raised as a capital will be enforced where the capital to that amount consisted of interest-bearing notes made by persons of unquestioned solvency; and the money need not be

**CONTRACT—(Continued.)**

actually paid in. The amount was raised in accordance with the condition of such promise when the same was assured by the undertaking of solvent and responsible obligors.—*Trustees of Westminster College v. Gamble*, 411.

11. *Contract—Equity—Specific Performance.*—If a contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree a specific performance as it is to give damages at law.—*Hardy v. Matthews*, 406.
12. *Partnership—Contract.*—A contract made with a party is not binding upon a partnership into which he subsequently enters, unless the firm assent thereto.—*Deere v. Plant*, 60.
13. *Contracts in restraint of trade, when void.*—A contract prohibiting one of the parties from carrying on any specific trade or business, having no reasonable limitations as to time or place, is void. The prohibition which extends any further than will fully protect the party for whose benefit the contract is made, in his occupation or business, is an unreasonable restraint of trade, and will render the contract void. But a contract which does not prohibit the defendant from carrying on the business designated at any place he may choose, but only limits the manner of carrying it on, by fixing the prices at which he may buy and sell, and the persons to whom he may sell, is not a restriction of trade according to any proper construction of the rule.—*Long v. Towl*, 545.
14. *Contracts—Consideration—Dismissal of Suits.*—The dismissal of suits palpably unjust forms no adequate consideration for a promise.—*Id.*
15. *Contracts—Bonds—Measure of Damages—Penalties.*—Defendant agreed with plaintiffs not to pay for ore taken from plaintiffs' land or elsewhere more than plaintiffs were paying, and to sell all ore purchased by him to plaintiffs, for which he was to receive four dollars per thousand pounds more than plaintiffs were then paying to the miners on their own land; and bound himself in a certain sum, "as liquidated damages," to be paid in case of a violation of or failure to perform any of such stipulations. Such a sum was held to be a penalty. Where an agreement secures the performance or omission of various acts, which are not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely. (*Basye v. Ambrose*, 28 Mo. 39, cited and affirmed.)—*Id.*  
See **BILLS AND NOTES**, 1. **PARTNERSHIP**, 1. **CITY ORDINANCES**, 1, 2. **AGENCY**, 1, 2.

**CONVENTION.**

See **CONSTITUTION**, 2.

**CONVEYANCES.**

1. *Fraudulent Conveyances—Assignments—Secret Preferences.*—In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general

## CONVEYANCES—(Continued.)

- scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction and be communicated to the other creditors and they do not object.—*Sullivan's Adm'r v. Collier White Lead and Oil Company*, 397.
2. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*—Such an agreement is against public policy—such an one as the law deems constructively fraudulent—and must therefore be held incapable of enforcement.—*Id.*
  3. *Agents of Corporations — Simple Contracts — Agency.*—The conveyance of real property must purport to be made and executed by the corporation acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.—*Musser v. Johnson*, 74.
  4. *Sheriff's Deed — Recitals.*—Where the plaintiff is bound to produce a judgment, the recitals in the deed under which he claims should conform to the judgment, in order that the court can see that the deed was made on the judgment.—*Carpenter v. King*, 219.
  5. *Execution — What Estates Vendible — Mere Trusts in Equity not Vendible.* The statute (R. C. 1853, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.—*McIlvaine v. Smith*, 45.
  6. *Equity — Debtor and Creditor — Creditor's Bills — Equitable Interest — Trusts.*—A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man cannot own property or money and not own it at the same time. He cannot be permitted to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction of such decree as may be rendered.—*Id.*
  7. *Executions — Property exempt from — Marriage Settlements — Construction of Statute.*—The provisions of the act exempting additional property from execution (R. C. 1855, p. 754, § 1) do not affect the right of the husband to

## CONVEYANCES—(Continued.)

receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.—*Pauley v. Vogel*, 291.

8. *Husband and Wife—Marriage Settlements—How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—*Id.*
9. *Husband and Wife—Voluntary Settlements—Creditors.*—As between the parties themselves, a voluntary settlement upon the wife may be upheld in equity. And where the husband is not indebted at the time of making it, such settlement cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view of being indebted at a future time, it will be void as against creditors prior and subsequent.—*Id.*
10. *Legislature—Powers—Tax Deeds.*—The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.—*Abbott v. Lindenbower*, 162.
11. *Tax Title—Ejectment—Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—*Id.*
12. *Tax Deeds—Proceedings under against persons not owners, would have what effect.*—A deed conveying the title under proceedings against a person who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and give it to another. (Rev. Act, art. 2, §§ 10, 29; Adj. Sess. Acts 1863-4; Gen. Stat. 1865, p. 100, § 13, p. 104, § 39, cited and compared.)—*Id.*
13. *False assessments void.*—An assessment in the name of a person who neither was nor ever had been the owner of the property, would be an utterly void assessment, and as against the owner of property cannot be made the foundation of a sale and conveyance of his land, even by legislative enactment.—*Id.*
14. *Ejectment—Evidence—Notice.*—In such a suit, evidence was admissible

## CONVEYANCES—(Continued.)

to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him.—*Id.*

15. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax books, and collection of taxes, and return of delinquent tax lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*

16. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863-4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.—*Id.*

17. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust raised by implication to a certain proportion of the estate. When trust money is issued by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land, and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.—*White v. Drew*, 561.

18. *Partition—Trust Estates, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*Id.*

See FRAUDULENT CONVEYANCES; HUSBAND AND WIFE; LANDLORD AND TENANT; LEASE, MORTGAGES, AND DEEDS OF TRUST.

## CORPORATIONS.

1. *Corporations—Railroad Companies—Eminent Domain, when granted.*—Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion.—*Dietrich v. Murdock*, 279.



## CORPORATIONS—(Continued.)

2. *Corporations—Railroad Companies—Lands—Permission to occupy—Effect of.*—Whether the proceedings of the railroad corporation were sufficient to divest the title of the owner of the land upon which the road was located, or whether he thereby had any notice of an intention on the part of the company to take any portion of his land, is immaterial, if for a number of years after the initiatory steps taken for the location and construction of the road, there was no attempt on his part to prevent the execution of the work. In such case it must be assumed that the occupation of his land by the company for the purpose to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and, if compelled to leave the premises by proper proceedings, would permit such property to be removed.—*Id.*
3. *Railroad Companies—Consolidation.*—Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation.—*Powell v. North Mo. R.R. Co.*, 63.
4. *Railroad Companies—Amalgamation.*—An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation.—*Id.*
5. *Corporation—Dissolution—Effects—Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come.—*Id.*
6. *Corporation—Transfer—Creditors.*—A corporation cannot give away the effects belonging to it, to the prejudice of creditors. A court of equity will follow the trust fund into the hands of other than *bona fide* creditors and purchasers.—*Id.*
7. *Agents of Corporations—Simple Contracts—Agency.*—The conveyance of real property must purport to be made and executed by the corporation, acting by its duly authorized agent. But in matters of simple contract the rule is not so strict, and an execution of an instrument will be inferred from the general principles of the law of agency.—*Musser v. Johnson*, 74.
8. *Seal—Authority—Evidence.*—Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The affixing of the seal is not conclusive evidence of authority; but if dispute arise, the contrary must be shown by the objecting party.—*Id.*
9. *Corporations—Seal—Evidence.*—The common-law doctrine that corporations can do no act except by writing, duly attested by the corporate seal, appears to be greatly relaxed in England by the recent decisions, and in this country to be almost if not entirely repudiated. But the law still seems to be well settled that the common seal of a corporation is to be taken as the

## CORPORATIONS—(Continued.)

only proper evidence of its act in all cases where a seal would be required if the instrument is to be executed by an individual.—*Sandford v. Tremlett*, 384.

10. *Lease—Assignment—Formalities required.*—It is not requisite that the assignment of a lease made by a corporation should possess the characteristics of a deed. Being a note in writing, signed by the agent of the corporation, authorized in the manner required by law, it is clearly within the terms of the act concerning frauds and perjuries, and must be considered competent evidence to show the transfer of the leasehold.—*Id.*

11. *Lease—Transfer—Individual—Corporation.*—An individual holding such a lease could transfer it without the formalities of a deed, and nothing more ought to be required of a corporation.—*Id.*

12. *Interest—License—Court of Criminal Correction, jurisdiction of.*—The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts 1865, p. 252) is repugnant to the general statute concerning interest (chap 89), and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93-96), and by virtue of § 2, chapter 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.—*State v. Rashbaum*, 501.

13. *Corporations—Citizenship.*—A corporation may be a citizen of a State, for the purpose of suing and being sued in the courts of the United States.—*Herryford v. Etna Insurance Company*, 148.

14. *Corporations—Citizenship in other States.*—Although a corporation may act by agents beyond the bounds of the State which created it, and become, constructively, resident of this State under the statute, not only for the purpose of suing and being sued, but for the purposes of taxation in respect to property found here, yet it does not follow that the corporation must therefore cease to be a citizen of another State, within the act of Congress of Sept. 24, 1789.—*Id.*

15. *Foreign Insurance Agencies—Pleading—Waiver.*—Under the first section of the act concerning foreign insurance agencies (R. C. 1855, p. 885, § 1), a corporation has the same right to remove a suit brought against it, into the courts of the United States, that any other citizen of another State would have when sued in this State. Nor did it waive this right by answering and proceeding to trial after such removal had been refused. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction.—*Id.*

See DAMAGES, 1, 3. PRACTICE, CIVIL—PLEADINGS, 8, 9, 10. PRACTICE, CIVIL—PARTIES, 1, 2. RAILROADS, 1.

16. *Corporations—Capital Stock—Taxation.*—That portion of the capital stock of a corporation which has been invested in bonds of the United States is not subject to taxation by the State.—*St. Louis Building and Savings Association v. Lightner*, 421.

## COURTS, COUNTY.

1. *County Courts—Repairs of County Buildings—Prohibitions.*—The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. (Gen. Stat. 1865, ch. 86, and ch. 137.) These matters belong to the administrative and ministerial functions of the County Court, and not to the judicial branch of their jurisdic-

COURTS, COUNTY—(*Continued.*)

tion. And for this reason it has been decided that even a prohibition will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. Even where a court of equity has jurisdiction to grant an injunction to restrain proceedings at law, it is never granted directly against a court, like a prohibition, but only against the persons who are parties to such proceedings, without impeaching the jurisdiction of the court itself.—*Vitt v. Owens*, 512.

2. *County Courts—Repairs of County Buildings—Mandamus—Injunction.*—

Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.—*Id.*

3. *Railroads—County Court—Subscription—Election—Construction of Statute.*—

The power given by section six of the act to incorporate the Platte City and Fort Des Moines Railroad Company (Adj. Sess. Acts 1859-60, p. 443), to the County Court of Platte county, to subscribe capital stock to said company, is, by section eight of the same act, made subject to the general railroad law. (R. C. 1855, p. 427, § 30.) And the true meaning and effect of this law is, that an election to ascertain the sense of the tax-payers as to such subscription is a necessary condition of the power to subscribe. A subscription made without such election was without authority of law, and void.—*Leavenworth and Des Moines Railroad Company v. County Court of Platte County*, 171.

4. *County Court—Appeals from—Jurisdiction of Circuit Court.*—

Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.—*Id.*

5. *County Court, appeal from—Action of the inferior court must be affirmed or reversed.*—

The failure to find any error in the proceedings on such an appeal is not proper ground for dismissing the appeal. The question presented by the record should be passed upon by the Circuit Court.—*Id.*

COURT OF CRIMINAL CORRECTION. See PRACTICE, CRIMINAL, 9; INTEREST, 1.

COURT, DISTRICT. See PRACTICE, CIVIL; APPEALS, 9.

COURT, PROBATE. See ADMINISTRATION, 3.

COURT, SUPREME. See PRACTICE; SUPREME COURT.

## CRIMES AND PUNISHMENTS.

See CRIMINAL LAW. PRACTICE, CRIMINAL.

## CRIMINAL LAW.

1. *Criminal Law — Assault — Words of provocation.*— Mere words, no matter how abusive they may be, cannot justify an assault.— *Murray v. Boyne*, 472.
2. *Criminal Law — Conspiracy — Evidence — Acts and Declaration of Co-conspirators.*— Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the acts of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.— *Id.*
3. *Criminal Law — Conspiracy — Evidence — Order of introduction of testimony.*— Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.— *State v. Louisa Daubert*, 239.
4. *Indictments — Sufficiency.*— In an action for perjury, for falsely taking a certain prescribed oath, where a part only of the oath was falsely taken, the indictment need not set out the whole, but may set out merely that portion of the oath taken which contained the falsehood.— *State v. Neal*, 119.
5. *Assault to Kill — Indictment — Averments — Construction of Statute.*— An indictment alleging that defendant, "feloniously, on purpose, and willfully," etc., "did then and there make an assault with the intent him, the said," etc., "then and there to kill," etc., but omitting to charge that the offense was committed "with malice aforethought," would be fatally defective under section 29, chapter 200, Gen. Stat. 1865, but is good and sufficient within the terms and meaning of section 32 of the same chapter. That the prosecutor used some of the terms embodied in section 29, such as "on purpose, and with a deadly weapon," is not to be regarded as absolutely conclusive that the indictment can be founded on that section only. These words may be treated as mere surplusage, and there will still remain a complete and sufficient description of an offense as designated in section 32.— *State v. Seward*, 203.
6. *Witnesses — Husband and Wife — Information.*— The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.— *State v. Berlin*, 572.
7. *Practice, Criminal — Indictment — Motion compelling to elect.*— The practice is now well settled that a motion to compel the prosecuting attorney to elect upon which count of an indictment he will proceed, is addressed to the sound discretion of the court trying the case, and the Supreme Court will not interfere with that discretion unless it is apparent that it has been exercised oppressively or to the manifest injury of the accused. Where the offense

## CRIMINAL LAW—(Continued.)

- charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and whenever there is a legal joinder the court may exercise its discretion as to an election.—*State v. Henry Daubert*, 242.
8. *Practice, Criminal—Indictment—Nolle Prosequi*.—Where two defendants were jointly charged, in the same indictment, on two counts: 1, for larceny, and 2, for receiving stolen goods, it was error to permit the circuit attorney to enter a *nolle prosequi* against one defendant upon the first count, and against the other upon the second. The two remaining counts really constituted two indictments, requiring different kinds of proof, and separate and independent verdicts.—*Id.*
9. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible*.—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.—*Id.*
10. *Practice, Criminal—Evidence—Verdict*.—If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.—*Id.*

## D

## DAMAGES.

1. *Street Railroads—Statute—Construction*.—The effect and intention of the act concerning street railroads, approved January 16, 1860, is that when the injury of the passenger is occasioned by his getting on or off the car at the forward platform, it shall be presumed as a matter of law that the negligence of the passenger himself contributed to produce the injury.—*McKeon v. Citizens' R. R. Co.*, 80.
2. *Damages—Punitive—When Allowed*.—Vindictive and punitive damages can be given, if ever, in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done.—*Id.*
3. *Railroad Companies—Responsibility*.—Street railroad companies are not responsible for the crimes of an employee; nor liable for his acts of willful and malicious trespass. They are only answerable for his negligence, or incapacity, or unskillfulness, in the performance of the duties assigned to him.—*Id.*
4. *Damages—Punitive—Civil Actions*.—It is questionable whether damages for punishment can be given in any civil action.—*Id.*
5. *Damages—Appeal—Practice*.—Where plaintiff, having claimed treble damages, was allowed single damages only, and failed to appeal from the judgment of the court, but the case was carried to the District Court by defendant, it was error to reverse the decision below and award plaintiff treble damages.—*Schmidt v. Densmore*, 225.
6. *County Collector—Refusal to issue Certificate—Action for Damages*.—A party cannot maintain an action for damages against the clerk of a county court for issuing a certificate of election to the office of State and county col-



## DAMAGES—(Continued.)

lector to another, and thereby depriving plaintiff of the emoluments of that office. The action for damages is predicated upon the idea that he is deprived of a legal and valid right. But plaintiff's proceeding is a virtual admission that the person to whom the certificate is issued is legally in possession of the office, and he cannot recover damages for being deprived of what does not belong to him. He cannot be permitted to disclaim his right to the office, and then have damages for being deprived of it.—*State, to use of Bradshaw, v. Sherwood, 179.*

7. *Contracts—Bonds—Measure of Damages—Penalties.*—Defendant agreed with plaintiffs not to pay for ore taken from plaintiffs' land or elsewhere more than plaintiffs were paying, and to sell all ore purchased by him to plaintiffs, for which he was to receive four dollars per thousand pounds more than plaintiffs were then paying to the miners on their own land; and bound himself in a certain sum "as liquidated damages," to be paid in case of a violation of or failure to perform any of such stipulations. Such a sum was held to be a penalty. Where an agreement secures the performance or omission of various acts, which are not measurable by any exact pecuniary standard, together with one or more acts in respect to which the damages on a breach of contract are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely. (*Bayse v. Ambrose, 28 Mo. 39, cited and affirmed.*)—*Long v. Towl, 545.*

8. *Fraud and Deceit—When ground of Action for Damages.*—Where a person affirms either what he knows to be false, or what he does not know to be true, to the prejudice of another and for his own gain, he must answer in damages. But general fraudulent conduct, general dishonesty of purpose, or a mere general intention to deceive, amount to nothing unless they are connected with the particular transaction complained of and are shown to be the very ground on which the other party acted and on which the transaction took place, and he must have been actually deceived and defrauded by the representations made. Nor can damages be recovered for the breach of a mere gratuitous promise of favor, or for the consequence of undue confidence or want of prudence in affairs, or for oppressive conduct in foreclosing a mortgage under a power of sale, where the requirements of the contract have been pursued.—*Rutherford v. Williams, 18.*

9. *Equity—Grounds for Relief.*—To entitle a party to relief in equity, there must be some ground for specific relief beyond a mere claim for damages or for the payment of money.—*Id.*

See EQUITY, 7.  SEE PARTICULARLY ADDENDA. 

## DEEDS OF TRUST.

See CONVEYANCES; FRAUDULENT CONVEYANCES; MORTGAGES AND DEEDS OF TRUST.

## DOWER.

1. *Partition—Trust Estate, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*White v. Drew, 561.*

See HUSBAND AND WIFE.

## E

## EJECTMENT.

1. *Tax Title—Ejectment—Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—*Abbott v. Lindenbower*, 163.
2. *Ejectment—Evidence—Notice.*—In such a suit, evidence was admissible to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him.—*Id.*
3. *Practice—Actions—Recovery of Real Property—What the proper action for.*—Where the principal object sought to be accomplished by the plaintiff is to recover possession of real estate, a proceeding in the nature of a bill in equity is not the proper remedy. An adequate remedy at law for that purpose has been provided in the action of ejectment.—*Bobb v. Woodward*, 482.
4. *Practice—Ejectment—Counter Claim—Specific Performance.*—Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father.—*Harris v. Vinyard*, 568.

## ELECTIONS.

See CONSTITUTION, 2. REGISTRATION, 1.

## EMINENT DOMAIN.

1. *Eminent Domain, not given by implication.*—The power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language.—*Schmidt v. Densmore*, 225.
2. *Corporations—Railroad Companies—Eminent Domain, when granted.*—Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion.—*Dietrich v. Murdock*, 279.

## EQUITY.

1. *Equity — Grounds for Relief.*—To entitle a party to relief in equity, there must be some ground for specific relief beyond a mere claim for damages or for the payment of money.—*Rutherford v. Williams*, 19.
2. *Equity — Relief — How administered.*—Where there is any fraud touching property, courts of equity will interfere and administer a wholesome justice in favor of innocent persons who are sufferers by the fraud, without fault on their side, by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien.—*Id.*
3. *Courts of Equity — Equities of Redemption.*—Courts of equity will require that the power of disposing of equities of redemption shall be exercised in all fairness and integrity.—*Id.*
4. *Fraudulent Sales — Proceeds.*—Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity as a substitution for the original property, and be subjected to the same trust.—*Id.*
5. *Usurious Contracts — Equity.*—Even where the statute makes an usurious contract void, equity will aid the borrower only upon condition of his paying what is *bona fide* and really due. (*Ransom v. Hays*, 39 Mo. 445, cited and affirmed.)—*Id.*
6. *Courts of Equity — Relief — When granted.*—Relief by a court of equity is confined to instances of fraud and misrepresentation by one party, touching some matter of interest, contract, security, mortgage, or conveyance, or property of some kind, in respect of which the other party is going to deal on the faith of representations made as to the truth of facts, whereby he is induced to act and deal not only to his own injury and loss, but to the gain of the party who makes the false representation or practices the fraud and deceit. In these cases relief is administered in general for the purpose of annulling the contract, conveyance, or instrument, and subjecting the property so acquired to the purpose of making such representations good; sometimes even to compel the party to make up any deficiency in money, by way of compensation or damages, when the property itself proves insufficient or cannot be reached.—*Id.*
7. *Damages — Jury — Master in Chancery.*—Mere damages for an injury or a breach of contract must be assessed by a jury at law; but a compensation for beneficial and lasting improvements or profits made may be safely ascertained before a master, or upon an issue directed, at discretion. The case must be one admitting of definite compensation, to be estimated in damages.
8. *Equity — Decree — Account.*—Where there is an equity for relief and an account may properly be taken, though the court cannot decree the plaintiff a recompense in damages for his loss, it may substitute an account of the defendant's profits.—*Id.* 20.
9. *Equity — Debtor and Creditor — Creditor's Bills — Equitable Interest — Trusts.*—A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man cannot own property or money and not own it at the same time. He cannot be permitted

**EQUITY—(Continued.)**

- to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction of such decree as may be rendered.—*McIlvaine v. Smith*, 45.
10. *Equity—Statutory Powers.*—Where an equitable defense to an action amounted to nothing more than the showing of an incomplete or imperfect execution of a statutory power, there was no ground for the interference of a court of equity.—*Hubble v. Vaughan*, 138.
11. *Equity—Purchaser—Fraud—Relief.*—It is a well-settled principle of equity law that where one becomes a purchaser, under such circumstances as would make it a fraud to permit him to hold on to his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtain it at a sacrifice, the court will relieve against such frauds; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby.—*McNew v. Booth*, 189.
12. *Equity—Payment—Reasonable Time.*—Where, in case of property sold under a deed of trust, the debtor party is promised a reconveyance thereof upon payment of the money owing under the deed within a reasonable time, special circumstances, the situation of the parties, and the character of the property, must be taken into account in affixing the standard. Where a person became possessed of property in such a way that the law would have held him a trustee, the lapse of time would make no difference.—*Id.*
13. *Husband and Wife—Marriage Settlements—How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—*Pawley v. Vogel*, 291.
14. *Husband and Wife—Wife's Trust Estate—What Proceedings to protect against Husband's Creditors.*—If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.—*Id.*

## EQUITY—(Continued.)

15. *Corporation—Dissolution—Effects—Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come.—*Powell v. North Missouri R.R. Co.*, 63.
16. *Contract—Equity—Specific Performance.*—If a contract be entered into by a competent party, and be in its nature and circumstances unobjectionable, it is as much of course for a court of equity to decree a specific performance as it is to give damages at law.—*Hardy v. Matthews*, 406.
17. *Practice—Trial—Appeal—Review of Evidence—Causes at Law and in Equity distinguished.*—In common law proceedings, as to questions of fact which are properly triable before a jury or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.—*King v. Moon*, 551.
18. *Fraud—Presumptions in Law and Equity.*—Fraud may be presumed in equity, but must be proved at law. Therefore, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict.—*Id.*
19. *Partnership—What issues triable by the Court.*—Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.—*Hunter v. Whitehead*, 524.

## ESTOPPEL.

1. *Landlord and Tenant—Lease—Occupation under—Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.—*Grant v. White*, 285.

See INSURANCE, 11, 12.

## EVIDENCE.

1. *Evidence—Admissibility—Sufficiency—Competency.*—Where the objections offered to the admissibility of a paper in evidence go, not to the competency, but merely to the sufficiency of the statements therein made, the court committed no error in permitting it to be read.—*Deitrich v. Murdock*, 279.
2. *Fraud—Evidence.*—In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.—*Hubble v. Vaughan*, 133.
3. *Witnesses—Deed of Trust—Testimony of Maker—Incompetency of, under Statute.*—Under the second subdivision of section six of the act concerning witnesses (R. C. 1855, p. 1578), testimony of the maker of a deed of trust, tending to show that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out, or that a large portion of it was the amount of



## EVIDENCE—(Continued.)

- an order for goods never delivered to him, and that, by the advice and direction of the parties for whose benefit the deeds were executed, this sum was falsely stated for the purpose of deterring his other creditors from proceeding against his property, was incompetent.—*Byrne v. Becker*, 264.
4. *Confirmation, Certificate of—Admissibility of Parol Evidence to correct errors in.*—Suit in ejectment was brought by the representatives of Joseph Lacroix to obtain the title to certain property adjoining St. Louis. The proof embraced a certificate of confirmation, under the act of Congress passed May 26, 1824, which named "Louis Lacroix" as the person entitled to the property in dispute. If the case had proceeded upon the theory that Joseph Lacroix and Louis Lacroix were two distinct individuals actually living in St. Louis at the date of the certificate, parol evidence would be inadmissible to show that the instrument was intended for a different person than the one therein named, thereby taking the title from Louis Lacroix, in which it had been vested, and transferring it to one in whom it had not been vested. But parol evidence, by all the authorities, was admissible to show that Louis Lacroix resided in a different city, and died long before the claim to the property was proved, and that the person under whom the adverse party claimed was an impostor. And where the proof ascertained that there was no other person within the class to whom the certificate might have been given but Joseph Lacroix, parol evidence was admissible to prove his identity with the person described in the instrument as "Louis Lacroix," and a mistaken insertion by the recorder of the name of "Louis" instead of "Joseph."—*Williams v. Carpenter*, 327.
  5. *Confirmation, Certificate of—Nature and weight of, as Evidence.*—A certificate of confirmation under the act of 1824 does not convey title, but is merely *prima facie* evidence of the existence of certain facts at a former date, and may be rebutted or disproved by other competent evidence. It is in the nature of a deposition, and the testimony of witnesses or a deposition would be admissible to correct its errors.—*Id.*
  6. *Evidence—Original Deed of Trust and certified copy—Variance.*—Where notice of the sale of real estate under a deed of trust was published in a locality required by the deed, and all parties concerned in the sale had actual notice thereof, the publication was sufficient, although the certified copy of the record of the deed from the recorder's office made it appear that notice was to be published elsewhere; and the parties to the instrument must be held bound by its true reading.—*Jones v. Moore*, 413.
  7. *Actions—Malicious Prosecutions—Declarations.*—In actions for malicious prosecution, declarations of the defendant to show that he was not actuated by malice in commencing the prosecution are inadmissible.—*Moore v. Saurborin*, 490.
  8. *Sheriff's Deed—Recitals—What, prima facie Evidence.*—A sheriff's deed which recites the date of the rendition of the judgment, the amount for which it was rendered, the names of the parties to the record, the time of filing the transcript, and the time when execution was issued, is sufficiently definite to render it *prima facie* evidence and shift the burden of proof upon the adverse party, if he denies its validity, even if it does not recite the name of the justice of the peace before whom it was rendered. Such recitals contained every material fact required by the statute relating to executions.—*Carpenter v. King*, 219.

## EVIDENCE—(Continued.)

9. *Sheriff's Deed, presumptive evidence of its recitals—Burden of Proof.*—The sheriff's deed is presumptive evidence of the recitals contained in it, without any accompanying proofs; subject, however, to be destroyed or invalidated when attacked by a party resisting it. (*McCormick v. Fitzmorris et al.*, 39 Mo. 24, affirmed.)—*Id.*
10. *Legislature—Powers—Tax Deeds.*—The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.—*Abbott v. Lindenbower*, 162.
11. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax books, and collection of taxes, and return of delinquent tax lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*
12. *Ejectment—Evidence—Notice.*—In such a suit, evidence was admissible to show that the judgment against defendant's land had been rendered without notice to the owner. Without such notice, the court could have no lawful jurisdiction over him.—*Id.*
13. *Written Instrument—Ambiguity—Parol Evidence.*—Where the matter is uncertain, on the face of the instrument, whether it was intended to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation.—*Musser v. Johnson*, 74.
14. *Seal—Authority—Evidence.*—Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. The affixing of the seal is not conclusive evidence of authority; but if dispute arise, the contrary must be shown by the objecting party.—*Id.*
15. *Act of Congress of 1812—Commons Title—Recorder Hunt's Certified List—Proof of inhabitation, cultivation, etc., prior to 1803.*—A commons title under act of Congress of June 13, 1812, with an approved survey, is equivalent to a patent, and must prevail, unless the claimant can prove the facts necessary to show that no title passed; and this may be done by actual proof that claimant had inhabited, cultivated, or possessed a lot, within the meaning of that act, prior to December 20, 1803, situated within the boundaries of the survey of the commons. But documentary evidence, consisting of Recorder Hunt's certified list of lots conferred under the acts of June 13, 1812, and May 26, 1824, a U. S. survey and field notes showing the lot sued for, and a certificate of confirmation issued by the United States recorder of land titles, taken alone, are only *prima facie* evidence of title, and not sufficient to surmount the commons title under the act of 1812. (*Vasquez v. Ewing*, 24 Mo. 31, affirmed.) And it is not enough merely to prove inhabita-

## EVIDENCE—(Continued.)

- tion, cultivation, or possession, somewhere on the land claimed. There must also be evidence of the location and boundaries of the lot.—*Vasquez v. Ewing*, 247.
16. *Out-lot—How shown by evidence of facts in pais.*—When an out-lot is to be proved by evidence of facts *in pais*, it must be shown to have existed in the character of an out-lot prior to December 20, 1803, with designated and ascertainable location and boundaries; though actual occupancy or cultivation may not be essential to establish its existence.—*Id.*
17. *Criminal Law—Conspiracy—Evidence—Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the act of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.—*State v. Louisa Daubert*, 239.
18. *Criminal Law—Conspiracy—Evidence—Order of introduction of testimony.*—Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.—*Id.*
19. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible.*—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.—*State v. Henry Daubert*, 242.
20. *Practice, Criminal—Evidence—Verdict.*—If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.—*Id.*
21. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 587, § 5), it must appear that she conducted the business or transaction about which she was testifying.—*Hardy v. Matthews*, 406.
22. *Fire Insurance Policy—Evidence.*—Where no written application is required as a condition for the issuing of a policy of fire insurance, and the policy contained a condition that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy would be void," and it appeared that at the date of the policy the plaintiff, assured, owned only an individual half-interest in the property insured, and that there were encumbrances upon it, neither of which facts was expressed in said policy: *held*, that it was competent for the assured, in case

## EVIDENCE—(Continued.)

- of loss, to prove that, before the policy was delivered or the premium paid, the plaintiff informed the agent of the company of the condition of the title and encumbrances.—*Franklin v. Atlantic Ins. Co.*, 456.
23. *Insurance Policy—Estoppels.*—*Held*, also, that where the agent of a foreign insurance company, whose policies contained the above-mentioned conditions, before issuing the policy or receiving the premium, being duly notified by the assured that his interest in the property was not entire, unconditional, and sole, and that there were encumbrances upon the property, failed to duly express these facts in a policy prepared by himself, and delivered it to the assured, saying that "it made no difference; it was all right," or words to that effect, and received the premium, the act of the agent was such a waiver of the conditions named as would amount to an estoppel *in pais*.—*Id.*
24. *Corporations—Seal—Evidence.*—The common-law doctrine that corporations can do no act except by writing, duly attested by the corporate seal, appears to be greatly relaxed in England by the recent decisions, and in this country to be almost if not entirely repudiated. But the law still seems to be well settled that the common seal of a corporation is to be taken as the only proper evidence of its act in all cases where a seal would be required if the instrument is to be executed by an individual.—*Sandford v. Tremlett*, 384.
25. *Practice—Trial—Appeal—Review of Evidence—Causes at Law and in Equity distinguished.*—In common-law proceedings, as to questions of fact which are properly triable before a jury, or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.—*King v. Moon*, 551.
26. *Fraud—Presumptions in Law and Equity.*—Fraud may be presumed in equity, but must be proved at law. Therefore courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict.—*Id.*
27. *Fraud—Real Property—Sale of—Possession not changed after—Fact of, how far proof of fraud.*—The fact that after sale of real estate possession was never taken, nor were acts of ownership ever exercised over the property by the vendee, would not, under the present system of registration, be conclusive evidence of fraud, but in connection with other circumstances indicating fraudulent intent is entitled to some weight.—*Id.*

## EXECUTIONS.

1. *Executions—Property exempt from—Marriage Settlements—Construction of Statute.*—The provisions of the act exempting additional property from execution (R. C. 1855. p. 754, § 1) do not affect the right of the husband to receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.—*Pauley v. Vogel*, 291.
2. *Execution—What Estates Vendible—Mere Trusts in Equity not Vendible.* The statute (R. C. 1855, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that

**EXECUTIONS—(Continued.)**

- it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.—*McIlvaine v. Smith*, 45.
3. *Executions—Notice.*—The provision of the statute (Gen. Stat. 1865, ch. 160, §§ 43, 44) which requires notice to be given to a defendant where an execution is issued to a county other than that in which he resides, has been uniformly held to apply only to cases where the execution is sent to be levied on land situate in a county different from that in which the judgment was rendered and the execution issued.—*Harper v. Hopper*, 124.
4. *Justice's Court—Judgment—Transcript—Execution—Construction of Statute.*—The provision of section 6, ch. 90, p. 951, R. C. 1855—section 6, ch. 182, p. 712, Gen. Stat. 1865—which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court after three years had elapsed, without having the same revived, referred exclusively to the issuing of executions by the justice of the peace, and had no application to proceedings on a transcript. The plain import and intention of section 17, ch. 90, p. 961, R. C. 1855—section 14, ch. 183, p. 717, Gen. Stat. 1865—is, that the lien should attach from the time the transcript is filed, for the same length of time and with like effect as upon a judgment, from the date of its rendition.—*Carpenter v. King*, 219.

**F****FRAUDS AND PERJURIES.**

1. *Fraud and Deceit—When ground of Action for Damages.*—Where a person affirms either what he knows to be false, or what he does not know to be true, to the prejudice of another and for his own gain, he must answer in damages. But general fraudulent conduct, general dishonesty of purpose, or a mere general intention to deceive, amount to nothing unless they are connected with the particular transaction complained of and are shown to be the very ground on which the other party acted and on which the transaction took place, and he must have been actually deceived and defrauded by the representations made. Nor can damages be recovered for the breach of a mere gratuitous promise of favor, or for the consequence of undue confidence or want of prudence in affairs, or for oppressive conduct in foreclosing a mortgage under a power of sale, where the requirements of the contract have been pursued. And the damage resulting from the fraud or misconduct must be the direct and immediate consequence of the wrongful act.—*Rutherford v. Williams*, 18.
2. *Frauds—Resulting Trusts.*—A party who has acquired property or gained an advantage by means of his fraudulent acts should be declared a trustee for the benefit of him who is injured by such fraud.—*Id.*, 19.
3. *Fraud—Presumptions in Law and Equity.*—Fraud may be presumed in equity, but must be proved at law. Therefore, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which courts of law would not always deem sufficient to justify a verdict.—*King v. Moon*, 551.



## FRAUDS AND PERJURIES—(Continued.)

4. *Promissory Note — Parol Contract, when valid consideration — Statute of Frauds.*—Where plaintiff made a parol contract for the purchase of a mill, and subsequently agreed with defendants to permit them to become the purchasers in his stead, in consideration of which agreement they gave him their note for one thousand dollars, and in pursuance of this arrangement the property was conveyed to defendants: *held*, that the assignment of the advantages to be derived from the contract for the purchase of the mill was a sufficient consideration for the note, and binding upon the maker, notwithstanding the provisions of the statute of frauds. Although a parol contract for the sale of real estate is made void by the statute, it is not wicked or corrupt, and the parties may waive its provisions. This defendants did when they accepted the title which they acquired to the property by virtue of the agreement. Had the action been prosecuted on the original contract, for specific performance, the objection that it was not in writing would have been fatal.—Kratz v. Stocke, 351.
5. *Contracts, executed and executory.*—Where the promise originated wholly out of a transaction past and executed, the case is to be distinguished from that where, as in the case at bar, a new and executory contract arises.—*Id.*

See FRAUDULENT CONVEYANCES.

## FRAUDULENT CONVEYANCES.

1. *Attachment — Deed of Trust — Intent of Maker to hinder and delay not participated in by Beneficiaries.*—An intent on the part of the maker of a deed of trust, in the execution of the instrument, to hinder, delay, or defraud his creditors, unless such intent was participated in by the beneficiaries in the deed, does not render it fraudulent and void.—Byrne v. Becker, 264.
2. *Fraudulent Conveyances — Assignments — Secret Preferences.*—In a deed of composition made by a debtor for the benefit of his creditors at large, each creditor who signs it comes into the agreement on the understanding that all will share mutually, or according to the terms embodied in the instrument. And if the signatures of some of the creditors have been obtained by secret bargains or obligations granting them more favorable terms than the general scope and provisions of the composition deed will warrant, a gross deception is practiced on the other creditors, and both law and equity adjudge the transaction void. And any security given in pursuance of such contracts is absolutely void, even against the debtor who may have given such security. But an instrument creating an obligation of preference may be valid if it form part of the original transaction, and be communicated to the other creditors and they do not object.—Sullivan's Adm'r v. Collier White Lead and Oil Company, 397.
3. *Fraudulent Conveyances — Assignments — Secret Preferences — Public Policy.*—Such an agreement is against public policy, such an one as the law deems constructively fraudulent, and must therefore be held incapable of enforcement.—*Id.*
4. *Fraudulent Conveyances, statute concerning — Sale — Change of possession, what constitutes.*—The tenth section of the act concerning fraudulent conveyances (Gen. Stat. 1865, p. 440) necessarily implies that, as against the vendor, the possession must be exclusively in the vendee. There must be a complete change of the dominion and control over the property sold, and some

FRAUDULENT CONVEYANCES—(*Continued.*)

act which will operate as a divestiture of title and possession from the vendor, and a transference into the vendee. This necessarily excludes the idea of a joint or concurrent possession. It may not be essential or indispensable that the goods should be moved into a new or different house, but there must be some open, notorious, or visible act, clearly and unequivocally indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place; and, under the statute, the change must not be merely formal and temporary. But where the whole law has been complied with, there is nothing to prevent the employment of the vendor to render services in and about the property in the same manner as any other agent or employee.—*Claffin v. Rosenberg*, 439.

5. *Fraud—Evidence.*—In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.—*Hubble v. Vaughan*, 138.
6. *Fraudulent Sales—Proceeds.*—Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity as a substitution for the original property, and be subjected to the same trust.—*Rutherford v. Williams*, 19.
7. *Fraud—Real Property—Sale of—Possession not changed after—Fact of, how far proof of Fraud.*—The fact that after sale of real estate possession was never taken, nor were acts of ownership ever exercised over the property by the vendee, would not, under the present system of registration, be conclusive evidence of fraud, but in connection with other circumstances indicating fraudulent intent is entitled to some weight.—*King v. Moon*, 551.

See FRAUDS AND PERJURIES.

## G

## GARNISHMENT.

See ATTACHMENT.

## H

## HUSBAND AND WIFE.

1. *Husband and Wife—Marriage Settlements—How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like

## HUSBAND AND WIFE—(Continued.)

- that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—*Pawley v. Vogel*, 291.
2. *Husband and Wife—Voluntary Settlements—Creditors.*—As between the parties themselves, a voluntary settlement upon the wife may be upheld in equity. And where the husband is not indebted at the time of making it, such settlement cannot be impeached by subsequent creditors merely on the ground of its being voluntary. But if he were indebted at the time, or if it were made with a view of being indebted at a future time, it will be void as against creditors prior and subsequent.—*Id.*, 292.
  3. *Practice—Replevin—Trusts not recognized by action of.*—In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or of the equities of the wife.—*Id.*
  4. *Husband and Wife—Wife's Trust Estate—What Proceedings to protect against Husband's Creditors.*—If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.—*Id.*
  5. *Married Women—Separate Real Estate—Agents—Contract made by—Liability of Third Persons to Principal for.*—Although land belongs to a *femme covert* in her sole individual right, it is undoubtedly true that her husband is seized with her in the possession, and she must be held to be acting as his agent. But a man may delegate an agency to his wife, as well as to any other person; or he may ratify her acts as agent, although done without previous authorization. And an agent may make a contract in his own name, whether he describes himself as an agent or not, and his principal will be entitled to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit was given to the agent and it was intended by both parties that no resort should in any event be had by or against the principal upon it.—*Grant v. White*, 286.
  6. *Husband and Wife—Joinder of Parties—Ante-Nuptial Settlements—Debts of Wife contracted prior to Marriage—Liability of Husband for.*—The right of a creditor to a judgment against both husband and wife for the debt of the latter cannot be destroyed by virtue of a contract between them that each should have the exclusive ownership and control of their own property, and that the separate property of each should be exempted from liability for the debts of the other contracted previous to the marriage.—*Obermeyer v. Greenleaf*, 304.
  7. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 587, § 5), it must appear that she conducted the business or transaction about which she was testifying.—*Hardy v. Matthews*, 406.
  8. *Executions—Property exempt from—Marriage Settlements—Construction of Statute.*—The provisions of the act exempting additional property from execution (R. C. 1855, p. 754, § 1) do not affect the right of the husband to receive and dispose of his wife's property; nor do they exempt her property from the indebtedness of the husband created after the reception of such property by the wife.—*Pawley v. Vogel*, 291.

HUSBAND AND WIFE—(Continued.)

9. *Witnesses—Husband and Wife—Information.*—The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.—*State v. Berlin*, 572.
10. *Partition—Trust Estates, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*White v. Drew*, 561.

I

INDICTMENT.

See CRIMINAL LAW. HUSBAND AND WIFE. PRACTICE, CRIMINAL. WITNESSES.

INJUNCTION.

See *Quinlivan v. English*, 362. MANDAMUS, 2.

INSTRUCTIONS.

See PRACTICE, CIVIL—CRIMINAL. SUPREME COURT. EVIDENCE. WITNESSES.

INSURANCE.

1. *Insurance—Application—Contract.*—Where an application for insurance was filed, and on the same day the company proceeded to make out and sign the policy, it ratified the application and its assent was complete. The acceptance of the proposal to insure for the premium offered is the completion of the negotiation.—*Keim v. Home Mutual Insurance Company*, 38.
2. *Insurance—Agreement—Notice of Fire.*—When the company accepted the premium and delivered the policy, the agreement to insure was complete and executed, and related back to the day when the application was filed and the policy made out and signed, and the insured was under no legal or moral obligation to notify the company that the building insured had been burned in the meantime.—*Id.*
3. *Insurance—Voluntary Contract—Suit brought, when.*—The contract of insurance is a voluntary contract, and the insurers have the same right to incorporate and impose the condition that all claims should be forfeited under it unless suit were brought to the next term of court, held sixty days or more after refusal of the company to pay, as they have to impose any other condition. If the insured objects to it, he is under no obligation to conclude the contract; but if he will voluntarily enter into it, he will be held bound thereby.—*Id.*
4. *Insurance—Suit, on what Contract.*—The suit can only be brought on the contract as contained in the policy.—*Id.*
5. *Policies of Insurance, when void in part; when in toto.*—The doctrine "void in part, void in toto" has no application to instruments or contracts which contain some forbidden vice or void parts, if the good be mixed with the bad, provided the separation can be made. The exceptions are, where a statute, by its express terms, declares the whole instrument or contract void on account of some provision which is unlawful; or where there is some all-pervading

## INSURANCE—(Continued.)

vice, such as fraud, or some unlawful act which is condemned by public policy or the common law, and avoids all parts of the transaction because all are alike infected.—*Koontz v. Hannibal Savings and Insurance Company*, 126.

6. *Policies of Insurance—False Warranty.*—Where a policy of insurance upon a certain livery stable was made to cover both the personal and real estate, and the application of the assured contained a false warranty touching encumbrances upon the real estate; and where it further appeared that the personal property was separately valued and appraised, and nothing showed that the representation as to the encumbrances upon the stable formed any inducement to the execution of the policy covering the personal property: *held*, that the assured might recover the value of the latter, although the policy was rendered void as to the real estate by reason of such false warranty.—*Id.*
7. *Insurance Policies—Causes of Exclusion—Construction.*—A policy of insurance contained the following clause: "Provided, always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or of any loss by theft at or after the fire:" *held*, that the clause of exclusion was intended to cover acts of spoliation or burning committed by an army of invasion or rebellion, even when performed without any direct commands from the superior officers. The real question to be settled in determining the meaning of the clause is, did the fire happen, or the loss occur, by reason of, or in consequence of, the military and usurped power of the rebels, and were they the proximate cause of the burning and destruction of property?—*Barton v. Home Insurance Company*, 156.
8. *Fire Insurance Policy—Variation, effect of.*—The charter of a mutual fire insurance company contained a provision that "if property insured by said company shall be alienated by sale or otherwise, the policy issued thereon shall be void, and shall be surrendered to said company to be canceled." Property so insured was sold, and the holder of the policy agreed with the secretary of the company that said policy should be so altered as to cover other property of the assured, differently situated; and this agreement was indorsed on the policy and signed by the secretary. *It seems* that such provision avoided the policy utterly, not only as to the property originally insured, but as to that so agreed to be substituted in its place.—*Mound City Insurance Company v. Curran*, 374.
9. *Fire Insurance Policy—Premium Note, consideration of—Power of insured to recover loss upon Policy.*—Such a policy is utterly void independently of this provision, for neither the insured nor the alienee of the insured could have recovered a loss upon it. After the alienation the consideration of the note would fail, and the note itself would become void also.—*Id.*
10. *Fire Insurance—Written Application—Authority of Secretary alone to make Contract of Insurance.*—Where the charter and by-laws of an insurance company provided that policies should be issued only upon a written application, making representation of all material circumstances affecting the risk, and should be signed by the president and secretary, such indorsement of the secretary was void. He had no authority to make a policy or contract of insurance otherwise than in the manner prescribed in the charter and by-laws. Even though the president had signed the original policy, and the same instru-



## INSURANCE—(Continued.)

ment was again issued by the secretary as a blank newly filled up upon verbal application, this would have been equally without authority and a fraud upon the company.—*Id.*

11. *Fire Insurance Policy—Evidence.*—Where no written application is required as a condition for the issuing of a policy of fire insurance, and the policy contained a condition that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy would be void," and it appeared that at the date of the policy the plaintiff, assured, owned only an undivided half-interest in the property insured, and that there were encumbrances upon it, neither of which facts was expressed in said policy: *held*, that it was competent for the assured, in case of loss, to prove that, before the policy was delivered or the premium paid, the plaintiff informed the agent of the company of the condition of the title and encumbrances.—*Franklin v. Atlantic Ins. Co.*, 456.
12. *Insurance Policy—Estoppels.*—*Held*, also, that where the agent of a foreign insurance company, whose policies contained the above-mentioned conditions, before issuing the policy or receiving the premium, being duly notified by the assured that his interest in the property was not entire, unconditional, and sole, and that there were encumbrances upon the property, failed to duly express these facts in a policy prepared by himself and delivered it to the assured, saying that "it made no difference; it was all right," or words to that effect, and received the premium, the act of the agent was such a waiver of the conditions named as would amount to an estoppel *in pais*.—*Id.*
13. *Foreign Insurance Companies—Agents.*—Foreign insurance companies are bound by the acts of their local agents, acting within the scope of their general authority, without any immediate knowledge of the transaction on the part of the company.—*Id.*

## INTEREST.

1. *Interest—License—Court of Criminal Correction, jurisdiction of.*—The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts 1865, p. 252) is repugnant to the general statute concerning interest (chap 89), and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93-96), and by virtue of § 2, chapter 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.—*State v. Rashbaum*, 501.
2. *Usurious Contracts—Equity.*—Even where the statute makes an usurious contract void, equity will aid the borrower only upon condition of his paying what is *bona fide* and really due. (*Ransom v. Hays*, 39 Mo. 445, cited and affirmed.)—*Rutherford v. Williams*, 18.

## J

## JUDGMENT.

See EXECUTIONS, 4. JUSTICE'S COURT, 1. PRACTICE, CIVIL. APPEAL. TRIAL, 9, 10, 19—CRIMINAL, 11.

## JURISDICTION.

1. *County Court—Appeals from—Jurisdiction of Circuit Court.*—Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.—*County of St. Louis v. Lind*, 348.
2. *Practice—Circuit Court—Jurisdiction of, when inquired into.*—The question whether the Circuit Court has jurisdiction of the cause may always be inquired into.—*Hannibal & St. Joseph R.R. Co. v. Mahoney*, 467.
3. *Interest—License—Court of Criminal Correction, jurisdiction of.*—The sixth section of the act incorporating the Missouri Benevolent and Loan Association (Adj. Sess. Acts, 1865, p. 252) is repugnant to the general statute concerning interest (chapter 89) and is inconsistent with the general statute concerning licenses of merchants, brokers, and others (chap. 93-6), and by virtue of § 2, chap. 224, is therefore repealed; and the Court of Criminal Correction has no jurisdiction over the case of an information against a pawnbroker for misdemeanor thereunder.—*State v. Rashbaum*, 501.  
See JUSTICES' COURTS, 3. PRACTICE, CIVIL. ACTIONS, 3.

## JURY.

See PRACTICE, CIVIL. TRIALS.

## JUSTICES' COURTS.

1. *Justice's Court—Judgment—Transcript—Execution—Construction of Statute.*—The provision of section 6, chap. 90, p. 951, R. C. 1855—section 6, chap. 182, p. 712, Gen. Stat. 1865—which prohibited a party or his legal representatives from suing out an execution upon a judgment of the justice's court after three years had elapsed, without having the same revived, referred exclusively to the issuing of executions by the justice of the peace, and had no application to proceedings on a transcript. The plain import and intention of section 17, chap. 90, p. 961, R. C. 1855—section 14, chap. 183, p. 717, Gen. Stat. 1865—is, that the lien should attach from the time the transcript is filed, for the same length of time and with like effect as upon a judgment, from the date of its rendition.—*Carpenter v. King*, 219.
2. *Justice's Court—Trial—Consolidation of Suits.*—The action of a justice of the peace in consolidating different suits is improper if thereby the amount in controversy will be increased beyond the jurisdiction of the justice, even where they are brought by plaintiff against the same defendant, and are based upon causes of action which, under the statute, may be joined and determined in the same suit.—*Bridle v. Grau*, 359.
3. *Justice's Court—Jurisdiction.*—But where judgment is rendered for an amount within the jurisdiction of the justice, without exception on the part of plaintiff, it will be permitted to stand for that amount, notwithstanding such order of consolidation.—*Id.*
4. *Justice's Court—Appeal—Amount of Judgment.*—Upon appeal trial in the Circuit Court, judgment for a larger sum than that within the jurisdiction of the Justice's Court is erroneous.—*Id.*

## L

## LAND TITLES.

1. *Statute—Quieting Titles—Construction.*—In order to institute proceedings under the statute touching suits for quieting titles (Gen. Stat. 1865, p. 662, § 53), the petitioner must be in actual possession of the premises; the object of the petition being, not for the purpose of settling the title in the first instance, but only preliminary to an action which the defendant or adverse claimant may be ordered to bring for that purpose.—*Rutherford v. Ullman*, 216.
2. *Act of Congress of 1812—Commons Title—Recorder Hunt's Certified List—Proof of inhabitation, cultivation, etc., prior to 1803.*—A commons title under act of Congress of June 13, 1812, with an approved survey, is equivalent to a patent, and must prevail, unless the claimant can prove the facts necessary to show that no title passed; and this may be done by actual proof that claimant had inhabited, cultivated, or possessed a lot, within the meaning of that act, prior to December 20, 1803, situated within the boundaries of the survey of the commons. But documentary evidence, consisting of Recorder Hunt's certified list of lots confirmed under the acts of June 13, 1812, and May 26, 1824, a U. S. survey and field-notes showing the lot sued for, and a certificate of confirmation issued by the United States recorder of land titles, taken alone, are only *prima facie* evidence of title, and not sufficient to surmount the commons title under the act of 1812. (*Vasquez v. Ewing*, 24 Mo. 31, affirmed.) And it is not enough merely to prove inhabitation, cultivation, or possession, somewhere on the land claimed. There must also be evidence of the location and boundaries of the lot.—*Vasquez v. Ewing*, 247.
3. *Out-lot—Existence of facts necessary to constitute, how determined.*—The existence of facts necessary to constitute an "out-lot" is a question of law for the court.—*Id.*
4. *Out-lot—Location and Boundaries prior to 1803.*—To constitute such a lot, it must be shown to have had an existence as such under the former government, prior to the 20th of December, 1803, with a definite location and boundaries.—*Id.*
5. *Out-lot—Surveyor-General—Power of, to assign location to.*—The Surveyor-General had no authority by law to assign a location to such out-lots, but authority only to survey them by their definite location and boundaries as they had actually existed prior to 1803, or as the same had been proved before the recorder; nor had his superior officers of the land office any authority by law to create, by instructions, a definite location and boundaries for such lots, where none existed before.—*Id.*
6. *Out-lot—How shown by evidence of facts in pais.*—When an out-lot is to be proved by evidence of facts *in pais*, it must be shown to have existed in the character of an out-lot prior to December 20, 1803, with designated and ascertainable location and boundaries; though actual occupancy or cultivation may not be essential to establish its existence.—*Id.*
7. *Concession under Spanish Government—Abandonment—Re-annexation.*—Where, under the former government, a written concession, by the Lieutenant Governor, of certain land was given upon a condition set forth in the conces-

## LAND TITLES—(Continued.)

sion, and on the margin of the record of the same was a subsequent entry declaring that the lot remained incorporated in the royal domain on account of the owner having abandoned it, such entry must be competent to show that the practice of abandonment and re-annexation prevailed at that time, and, *a fortiori*, it must be competent to show a re-annexation of the very land conceded.—*Id.*

8. *Confirmation, Certificate of—Admissibility of Parol Evidence to correct errors in.*—Suit in ejectment was brought by the representatives of Joseph Lacroix to obtain the title to certain property adjoining St. Louis. The proof embraced a certificate of confirmation, under the act of Congress passed May 26, 1824, which named "Louis Lacroix" as the person entitled to the property in dispute. If the case had proceeded upon the theory that Joseph Lacroix and Louis Lacroix were two distinct individuals actually living in St. Louis at the date of the certificate, parol evidence would be inadmissible to show that the instrument was intended for a different person than the one therein named, thereby taking the title from Louis Lacroix, in whom it had been vested, and transferring it to one in whom it had not been vested. But parol evidence, by all the authorities, was admissible to show that Louis Lacroix resided in a different city, and died long before the claim to the property was proved, and that the person under whom the adverse party claimed was an imposter. And where the proof ascertained that there was no other person within the class to whom the certificate might have been given but Joseph Lacroix, parol evidence was admissible to prove his identity with the person described in the instrument as "Louis Lacroix," and a mistaken insertion by the recorder of the name of "Louis" instead of "Joseph."—*Williams v. Carpenter*, 327.
9. *Confirmation, Certificate of—Nature and weight of, as Evidence.*—A certificate of confirmation under the act of 1824 does not convey title, but is merely *prima facie* evidence of the existence of certain facts at a former date, and may be rebutted or disproved by other competent evidence. It is in the nature of a deposition, and the testimony of witnesses or a deposition would be admissible to correct its errors.—*Id.*
10. *Hunt's Minutes, Evidence of what.*—The minutes of Recorder Hunt, where objection is offered, are inadmissible as a deposition to prove the facts testified to by witnesses therein. But in the absence of any such objection, they are admissible, like any other document, to show what they contain. Whether or not the contents are relevant or competent on the issues in the case, must be determined by the general rules of evidence.—*Id.*
11. *Tax Title—Ejectment—Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—*Abbott v. Lindenbower*, 162.
12. *Tax Deeds—Proceedings under against persons not owners, would have what effect.*—A deed conveying the title under proceedings against a person who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and

## LAND TITLES—(Continued.)

give it to another. (Rev. Act, art. 2, §§ 10, 29; Adj. Sess. Acts 1863-4; Gen. Stat. 1865, p. 100, § 13, p. 104, § 39, cited and compared.)—*Id.*

13. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax-books, and collection of taxes, and return of delinquent tax-lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*

14. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863-4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.—*Id.*

See LIMITATIONS, 1.

## LANDLORD AND TENANT.

1. *Landlord and Tenant—Lease—Tenancy from Year to Year—Tenancy at Will.*—Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract without any definite period for its termination, and in either case is construed to be a tenancy from year to year. But where a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, or where there is no express or implied consent, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice.—*Grant v. White*, 285
2. *Landlord and Tenant—Lease—Consent to continue in possession, how may be shown.*—Whether a possession is continued under an express or implied consent, is a question of fact. Circumstances may be sufficient to authorize a jury to infer an acquiescence on the part of the landlord in the tenant holding over. If the holding over by a tenant, after the expiration of his term of lease, is willful, it cannot be with consent either express or implied.—*Id.*, 286.
3. *Landlord and Tenant—Lease—Occupation under—Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.—*Id.*
4. *Landlord and Tenant—Lease—Possession—Construction of Statute.*—The provisions of section 27, chap. 187, Gen. Stat. 1865, cannot be invoked between the parties to an action for unlawful detainer, where defendant was lessee and held his possession under plaintiffs as lessors.—*Id.*
5. *Statute—Attornment—Possession.*—Under section 15 of Gen. Stat. 1865, p. 740, giving a key of premises to a third party by a tenant, without the consent of his landlord, is a void attornment, and in no wise affects the possession of the landlord.—*Rutherford v. Ullman*, 216.



**LEASE.**

1. *Landlord and Tenant—Lease—Tenancy from Year to Year—Tenancy at Will.*—Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period for its termination, and in either case is construed to be a tenancy from year to year. But where a tenant whose lease has expired is permitted to continue in possession, pending a treaty for a further lease, or where there is no express or implied consent, he is not a tenant from year to year, but so strictly at will that he may be turned out of possession without notice.—*Grant v. White*, 285.
2. *Landlord and Tenant—Lease—Consent to continue in possession, how may be shown.*—Whether a possession is continued under an express or implied consent, is a question of fact. Circumstances may be sufficient to authorize a jury to infer an acquiescence on the part of the landlord in the tenant holding over. If the holding over by a tenant, after the expiration of his term of lease, is willful, it cannot be with consent either express or implied.—*Id.*
3. *Lease—Assignment—Formalities required.*—It is not requisite that the assignment of a lease made by a corporation should possess the characteristics of a deed. Being a note in writing, signed by the agent of the corporation, authorized in the manner required by law, it is clearly within the terms of the act concerning frauds and perjuries, and must be considered competent evidence to show the transfer of the leasehold.—*Sandford et al. v. Tremlett*, 384.
4. *Lease—Transfer—Individual—Corporation.*—An individual holding such a lease could transfer it without the formalities of a deed, and nothing more ought to be required of a corporation.—*Id.*
5. *Landlord and Tenant—Lease—Occupation under—Estoppel.*—Where a party voluntarily entered into a contract for the lease of real estate, went into possession under it, and peaceably occupied the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.—*Grant v. White*, 286.
6. *Landlord and Tenant—Lease—Possession—Construction of Statute.*—The provisions of section 27, chap. 187, Gen. Stat. 1865, cannot be invoked between the parties to an action for unlawful detainer, where defendant was lessee and held his possession under plaintiffs as lessors.—*Id.*

**LIENS.**

See MORTGAGES AND DEEDS OF TRUST, 5. PARTITION, 1.

**LIMITATIONS.**

1. *Limitations—Adverse Possession.*—A defendant, setting up the defense of the statute of limitations against the legal title, must show that his possession was adverse under claim of ownership, and that it had continued a sufficient length of time to bar the owner and those claiming under him. The burden of proof is upon the defendant to show at what time his possession became adverse to the legal title.—*Doan v. Sloan*, 106.

**M****MARRIAGE SETTLEMENTS.**

See CONVEYANCES, 7, 8, 9. EXECUTIONS, 1. HUSBAND AND WIFE. PRACTICE, CIVIL—PARTIES, 3.

MANDAMUS.

1. *Mandamus—Payment by State Treasurer—Authority.*—Mandamus will not lie to compel the State treasurer to pay over the principal and interest of State bonds, without a special act of the legislature authorizing and commanding him to pay. Without such special act, he has no power to pay any money, except upon the warrant of the auditor drawn upon some appropriated fund.—State of Missouri ex rel. Third National Bank of Missouri v. Bishop, 505.
2. *County Courts—Repairs of County Buildings—Mandamus—Injunction.*—Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.—Vitt v. Owens, 512.
3. *Public Printer—Appendix—Price allowed.*—Under the twenty-first section of the act concerning the public printer (Gen. Stat. 1865, p. 148), the appendix to the journal of either house of the General Assembly constitutes a part of the journal; and although the greater part of the reports and public documents incorporated in the appendix by virtue of that section had already been printed in the journal, under the order of the two houses, or in pursuance of a law of the State requiring it to be done, yet the public printer would be entitled to charge separately for it, at the prices regulated by law. (State ex rel. Dyer v. Thompson, 41 Mo. 240, affirmed.)—State ex rel. Foster v. Rodman, 176.

MORTGAGES AND DEEDS OF TRUST.

1. *Purchaser—Mortgagee—Redemption of Property.*—When the beneficiary or mortgagee becomes himself the purchaser, and there is any fraud touching the sale, he will be considered a mere mortgagee in possession, and the grantor will be entitled to the rights of a mortgagor, and be allowed to redeem the property by paying the debt and interest. But the purchaser will be considered the owner of the property until his debt is fully paid.—Rutherford v. Williams, 19.
2. *Mortgages—Outstanding Title—Forfeiture.*—A mortgagee of land, who was in possession after the condition of the mortgage was broken, could defend successfully against the mortgagor, or any person claiming under him, so long as the debt remained unsatisfied; and a purchaser of the land, under a judgment against the mortgagor, after the execution of the mortgage, would acquire nothing more than the equity of redemption.—Hubble v. Vaughan, 138.
3. *Deeds of Trust—Notes—Priority of Payment—Special Contract.*—The principle of law that, where a deed of trust secures several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in

**MORTGAGES AND DEEDS OF TRUST—(Continued.)**

which they mature, can have no application to a case where the parties have specially agreed that payments shall be made transversely, and that the note last falling due shall have the priority of lien. And it does not alter the case that, by a provision of the deed, the grantor was expressly authorized to pay off the note first maturing at any time. This provision does not empower him to use the property encumbered by the trust for that purpose, without the consent or approbation of the securities upon the last maturing note.—*Ellis, Adm'r, v. Lamme, 153.*

4. *Deed of Trust—Sale—Payment by Note; when considered Cash.*—The terms of a deed of trust required that the real estate therein mentioned should be sold "for cash." Subsequent to the execution of the deed, and prior to the sale, the property became encumbered with various liens. At the sale, the purchaser paid for the property only a portion of the sum named as the purchase money, but gave his notes to the holders of the liens for the balances due them, over and above the amounts realized by them at the sale; and, in consideration of these notes, the lien-holders yielded up all their claims against the maker of the deed of trust: *Held*, that the notes so given were equivalent to cash placed in the hands of the trustee.—*Mead v. McLaughlin, 198.*
5. *Trustee—Purchase—Priority of Lien.*—The rule requiring the trustee to manage the trust estate for the benefit of his *cestui que trust* would not prevent his purchasing a lien against the estate, when this lien was subsequent, in point of time, to the execution of the deed under which the trustee acted, and to all other liens on the property. It was the interest of the trustee, in such case, to make the property realize not only the amount of the lien so purchased by him, but of all other liens which were prior and superior to his own.—*Id.*
6. *Evidence—Original Deed of Trust and certified copy—Variance.*—Where notice of the sale of real estate under a deed of trust was published in a locality required by the deed, and all parties concerned in the sale had actual notice thereof, the publication was sufficient, although the certified copy of the record of the deed from the recorder's office made it appear that notice was to be published elsewhere; and the parties to the instrument must be held bound by its true reading.—*Jones v. Moore, 413.*

**N****NEW TRIAL.**

See **PRACTICE—SUPREME COURT, 3.**

**O****OFFICERS.**

See **COUNTY AUDITOR, 1, 2. PRACTICE, CIVIL. ACTIONS, 1, 2, 5, 12. PLEADINGS, 5. PUBLIC PRINTER, 1. REVENUE, 1, 2, 4, 5.**

**P****PARTITION.**

1. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others

## PARTITION—(Continued.)

for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust used by implication to a certain proportion of the estate. When trust money is issued by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.—*White v. Drew*, 561.

2. *Partition—Trust Estates, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*Id.*

## PARTNERSHIP.

1. *Partnership—Contract.*—A contract made with a party is not binding upon a partnership into which he subsequently enters, unless the firm assent thereto.—*Deere v. Plant*, 60.
2. *Partnership Settlements—Outgoing Partner—Purchase of share of.*—Where the mode of partnership settlement and division of the partnership property that is provided in the articles becomes impracticable, or can not be fairly carried into effect, courts may order a sale of the property; but effect will be given to a stipulation that one or more of the parties shall be entitled to purchase the share of the outgoing partner at a valuation.—*Quinlivan v. English*, 362.
3. *Partnership—Assignment—Attachment Creditors.*—A partner cannot provide for individual debts due by his copartners, or by a mere stranger without any interest either in the property of the partnership or of either member of the firm, in a conveyance covering his entire property, to the exclusion of his *bona fide* creditors. As to the attaching creditors, such conveyance must be held to be utterly fraudulent and void.—*Kitchen v. Reinsky*, 427.
4. *Partnership—Performance.*—Where the proposition to form a partnership for the purpose of buying and selling lands was accepted and acted upon, and the contract in all respects fully executed, it was too late to deny the existence of the contract or to complain of the manner in which it was entered into. After having received the full benefit of the transaction and availed himself of all the advantages arising from the services rendered by his copartner, a party ought not to be heard in an attempt to defeat a recovery by charging that such copartner had acted in bad faith with the parties of whom the land had been purchased.—*Hunter v. Whitehead*, 524.
5. *Partnership—What issues triable by the Court.*—Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.—*Id.*
6. *Administration—Partnership Estates—Appeal—What bond required.*—A surviving partner administering on partnership effects has all the rights,

## PARTNERSHIP—(Continued.)

incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.)—*Bruening v. Oberschelp*, 276.

See PRACTICE, CIVIL—TRIAL, 17. SURETIES, 4.

## PRACTICE, CIVIL.

1. *Attachment—Order of Publication—Sufficiency.*—The order of publication required by the attachment act of 1855 (R. C. 1855, p. 246, § 23) did not itself operate an attachment, but was intended to impart notice to defendant of the pending attachment. And a publication notifying defendant that his property is "about to be attached," is sufficient, within the meaning of the statute.—*Harris v. Grodner*, 159.

## ACTIONS.

2. *County Collector—Refusal to issue Certificate—Action for Damages.*—A party cannot maintain an action for damages against the clerk of a county court for issuing a certificate of election to the office of State and county collector to another, and thereby depriving plaintiff of the emoluments of that office. The action for damages is predicated upon the idea that he is deprived of a legal and valid right. But plaintiff's proceeding is a virtual admission that the person to whom the certificate is issued is legally in possession of the office, and he cannot recover damages for being deprived of what does not belong to him. He cannot be permitted to disclaim his right to the office, and then have damages for being deprived of it.—*State, to use of Bradshaw, v. Sherwood*, 179.
3. *What remedies will lie.*—If the clerk refused to perform his functions in casting up the vote, or in issuing the certificate, an ample and complete remedy would be furnished by resorting to a mandamus; or, after the certificate was issued to the other party, and he had qualified, the title to the office could be tested and decided by a writ in the nature of a *quo warranto*.—*Id.*
4. *Statutory Rights—Relief—Jurisdiction.*—The principle that where a new right is conferred by statute, and a specific relief given for a violation of that right, all other jurisdictions are ousted, is not applicable to the present case.—*Id.*
5. *Pleadings—Jurisdiction—Question of, how raised.*—The objection raised by demurrer, that the court had no jurisdiction, would have been more properly raised by answer, inasmuch as the want of jurisdiction did not appear on the face of the petition. If the answer, when filed, denied the right of the plaintiff to the office, that would have amounted to an ouster of jurisdiction, because it would have made a contest indispensable. (Gen. Stat. 1865, p. 66, § 50.)—*Id.*
6. *County Collector—Right to Certificate—In what Court determined.*—The County Court was the tribunal in which the contest should have taken place, and the Circuit Court had no jurisdiction when the question concerning the right to the office was raised.—*Id.*
7. *Practice—Trespass—Action of, when brought—Construction of Statute.*—The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. Section 3, chap.



PRACTICE, CIVIL.—*Continued.*

- 163, p. 653, Gen. Stat. 1865, does not apply to actions of that description, but contemplates those where the suit was in the nature of a proceeding *in rem* affecting the land itself.—*Hannibal & St. Joseph R.R. Co. v. Mahoney*, 467.
8. *Practice—Joinder of Causes, legal and equitable—Election.*—Although under our present code a petition may embrace both legal and equitable causes of action, and will not for that reason be held bad upon demurrer, when the relief sought for under the different kinds of action is separately stated, yet the causes cannot be blended in the same trial. And the plaintiff may be compelled, upon motion, to elect on which cause of action he will proceed.—*Bobb v. Woodward*, 482.
9. *Practice—Actions—Recovery of Real Property—What the proper action for.*—Where the principal object sought to be accomplished by the plaintiff is to recover possession of real estate, a proceeding in the nature of a bill in equity is not the proper remedy. An adequate remedy at law for that purpose has been provided in the action of ejectment.—*Id.*
10. *Practice—Notice of Suit—Order of Publication.*—The true meaning of the statute concerning notice of suit to non-residents (Gen. Stat. 1865, chap. 164, § 13) is that the notice shall go to the extent of a substantial statement of all the objects of the suit; and notice by publication that the object of a suit was "to set aside" a deed conveying certain property, without any general statement of the grounds upon which the decree was prayed for, is insufficient, and a judgment rendered upon such a notice is null and void.—*Id.*
11. *Actions—Malicious Prosecution, grounds of.*—In an action for malicious prosecution, malice and want of probable cause together constitute the ground upon which alone the plaintiff can recover. The existence of both must be made to appear, although direct proof of malice is not necessary where the want of probable cause is satisfactorily established. In such cases the prosecution must be wholly ended and determined, but proof of innocence is not necessary to support the action.—*Moore v. Sauborin*, 490.
12. *Mandamus—Payment by State Treasurer—Authority.*—Mandamus will not lie to compel the State treasurer to pay over the principal and interest of State bonds, without a special act of the legislature authorizing and commanding him to pay. Without such special act, he has no power to pay any money, except upon the warrant of the auditor drawn upon some appropriated fund.—*State ex rel. Third National Bank v. Bishop*, 504.
13. *Statutory Actions—Averments.*—In a statutory action against a constable for wrongful attachment, the petition need not declare specifically that at the time of the attachment and levy the plaintiff was not a non-resident, nor was about to move out of the State with intent to change his domicile.—*State, to use of Ladd, v. Clark*, 519.
14. *Practice—Statutory Action—Proviso, must be pleaded.*—If the proviso contained in a statute furnishes matter of excuse for the defendant, it need not be negatived in the petition, but he must plead it. And it makes no difference whether the proviso be contained in the enacting clause or be subsequently introduced in a distinct form. It is the nature of the exception, not its location, which ought to govern.—*Id.*
15. *Practice—Statutory Actions—Exceptions in Statute—Pleading.*—Where in the same section of the statute in which the right of action is given the

## PRACTICE, CIVIL—(Continued.)

exception is contained, and it clearly appears that the plaintiff cannot maintain his cause of action without negating the exceptions, then the petition must be so framed as to show specifically that the party sued is not within such exceptions. But if plaintiff's right of action is complete under a statute, and there is a provision or exception either in that or some other statute which may be made available to defeat it, then the matter must be taken advantage of by way of defense.—*Id.*

16. *Practice—Replevin—Trusts not recognized by action of.*—In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or of the equities of the wife.—*Pawley v. Vogel*, 291.
17. *Bridges—Covenants to repair—Actions.*—Where a party entered into a bond obligating himself to build a certain bridge, and guaranteeing that the same should stand and remain for four years, and subsequently within that period said bridge got so out of repair as to be unsafe, his sureties became liable to an action for breach of covenants contained in said bond, even though the builder and his sureties on the bond had no written notice stating the repairs necessary to be made and requiring the same to be done. Sections 16 and 17, p. 326, R. C. 1855 (Gen. Stat. 1865, §§ 17, 18, p. 299) afford a cumulative remedy wholly independent and distinct from an action on the bond. The bond contained an express covenant, and no written notice was required to the undertakers or their securities to hold them responsible on their obligation. The stipulations bound them to fulfill their engagements, and any breach that accrued they were required to take notice of.—*Buchanan County v. Kirtley*, 534.
18. *Pleadings—Allegations.*—An allegation of notice in plaintiff's petition was immaterial, and should have been treated as surplusage.—*Id.*  
See COURTS, COUNTY, 1, 2. DAMAGES, 4. HUSBAND AND WIFE. REVENUE, 2, 3, 7.

## APPEALS.

1. *County Court—Appeals from—Jurisdiction of Circuit Court.*—Under section 13 of an act about roads in St. Louis county, approved March 10, 1849, an appeal from a final order in the County Court does not authorize a trial of the case *de novo*, nor does it provide for preserving the matters of exception that may arise in the progress of the trial in the lower court; it has only the effect of taking the record of the County Court into the appellate court as a writ of *certiorari* would. The Circuit Court can go no further than to ascertain whether the inferior court exceeded its jurisdiction, or in any respect proceeded illegally, in reference to the subject matter before it.—*County of St. Louis v. Lind*, 348.
2. *County Court, appeal from—Action of the inferior court must be affirmed or reversed.*—The failure to find any error in the proceedings on such an appeal is not proper ground for dismissing the appeal. The question presented by the record should be passed upon by the Circuit Court.—*Id.*
3. *Practice—Circuit Court—Appeal—Errors on the face of the Record, how revised.*—Where the error complained of in an appeal from the Circuit Court is apparent on the face of the record, it may be revised without the saving of exceptions or the filing of a motion for new trial.—*Hannibal and St. Joseph Railroad Company v. Mahoney*, 467.

## PRACTICE, CIVIL—(Continued.)

4. *Practice — Appeal — Failure to Prosecute.*—Where the record of a case shows that an appeal was taken therein more than thirty days prior to the term of this court, when the same is called for hearing and appellant has entirely failed to prosecute his suit, no cause being shown for the delay on the part of appellant, the judgment of the lower court will be affirmed. — *Trumbo's Adm'r v. Trumbo*, 500.
5. *Practice — Appeals — Filing of Transcript.*—Where the record of a cause shows that an appeal therein was taken to this court more than thirty days before the first day of the term in which the same is called for hearing, and that no transcript was filed by the appellant, and no satisfactory reason is shown why it was not filed, the judgment of the lower court will be affirmed. — *Williams v. Fiegler*, 503.
6. *Damages — Appeal — Practice.*—Where plaintiff, having claimed treble damages, was allowed single damages only, and failed to appeal from the judgment of the court, but the case was carried to the District Court by defendant, it was error to reverse the decision below and award plaintiff treble damages. — *Schmidt v. Densmore*, 225.
7. *Probate Court — Appeals — Bonds — Judgment against Securities.*—The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court. — *Dubois' Adm'r v. Walsh*, 273.
8. *Administration — Partnership Estates — Appeal — What bond required.*—A surviving partner administering on partnership effects has all the rights, incidents, and privileges, and incurs all the responsibilities, of a general administrator, within the sphere or limits of his prescribed duties; and in case of a judgment making a final distribution of the partnership estate, he is not required to give an additional bond in order to perfect his appeal therefrom. (Gen. Stat. 1865, chap. 127, §§ 1, 4.) — *Bruening v. Oberschelp*, 276.
9. *Practice, Civil — Appeals — Act establishing District Courts — Power of Circuit Judge to grant Appeals in Vacation.*—Where, nineteen days after the entry of a judgment in a Circuit Court, and in vacation, the judge before whom the cause was tried indorsed upon the transcript an order allowing an appeal to the District Court, and no reason was given for making this order, and no statement made in reference to it, except that it was done upon an inspection of the record: *held*, that such appeal was improperly entertained by the District Court, and ought to have been dismissed. Although in the act establishing District Courts the legislature failed to designate in express terms the manner of taking appeals or prosecuting writs of error from the Circuit Court, it evidently intended to make the provisions of the act of 1855 applicable to the new system contemplated by the constitution. Hence, to take an appeal from the Circuit to the District Court in all respects regular and proper, it is still necessary to comply with the provisions of that act—no provision of the statute, either expressly or by inference, authorizing the judge of a Circuit Court in vacation to make an order allowing such appeal. The powers formerly conferred upon the Supreme Court or any judge thereof to act in similar premises, have not been transferred to the District Courts. — *Jefferson City Savings Association v. Morrison*, 515.

## PRACTICE, CIVIL—(Continued.)

10. *Appeal, failure to prosecute.*—When no steps are taken to prosecute an appeal, the judgment of the court below will, on motion, be affirmed.—Coker v. Scott, 518.
11. *Practice — Trial — Appeal — Review of Evidence — Causes at Law and in Equity distinguished.*—In common-law proceedings, as to questions of fact which are properly triable before a jury or before the court where the parties assent thereto, the verdict or finding will not be disturbed where there has been no misdirection; but in chancery or equitable cases the whole matter is open to review and revision both as to the law and the fact.—King v. Moon, 551.

See JUSTICES' COURTS, 4.

## PARTIES.

1. *Corporations — Citizenship.*—A corporation may be a citizen of a State, for the purpose of suing and being sued in the courts of the United States.—Herryford v. Aetna Insurance Company, 148.
2. *Corporations — Citizenship in other States.*—Although a corporation may act by agents beyond the bounds of the State which created it, and become, constructively, resident of this State under the statute, not only for the purpose of suing and being sued, but for the purposes of taxation in respect to property found here, yet it does not follow that the corporation must therefore cease to be a citizen of another State, within the act of Congress of Sept. 24, 1789.—*Id.*
3. *Husband and Wife — Joinder of Parties — Ante-Nuptial Settlements — Debts of Wife contracted prior to Marriage — Liability of Husband for.*—The right of a creditor to a judgment against both husband and wife for the debt of the latter cannot be destroyed by virtue of a contract between them that each should have the exclusive ownership and control of their own property, and that the separate property of each should be exempted from liability for the debts of the other contracted previous to the marriage.—Obermeyer v. Greenleaf, 304.
4. *Parties to Actions — Who are real parties in interest.*—Where the lessee of certain real estate assigned to a third party his interest in the leasehold, he cannot bring an action in his own name to the use of the executors of the original lessor against the assignee of the leasehold. Under section 2, chapter 161, Gen. Stat. 1865, the action should be commenced by the executors in their own names.—Weise, to use of Walker, v. Gerner, 527.

See PRACTICE. PLEADINGS, 10.

## PLEADINGS.

1. *Attachment — Plea in Abatement — Answer.*—Where, in a suit by attachment, defendant pleads in abatement, and the issue is found in his favor, and he afterward answers, setting up the defense that neither plaintiff nor defendant resided in the county in which the suit was brought, the ruling of the court in causing the same to be stricken out was erroneous. Under the 42d section of the present attachment act (Gen. Stat. 1865, p. 567), the suit should have been proceeded upon to final judgment as though commenced by summons alone; and in suits so commenced, one of the parties must reside in the county where suit is brought in order to confer jurisdiction. (Gen. Stat. 1865, p. 653, § 1.) Hence, the answer, if true, was a complete bar to the action.—Peery v. Harper, 131.

## PRACTICE, CIVIL—(Continued.)

2. *Pleadings—Exceptions.*—Where a plea in abatement, and demurrer, were both overruled, and defendant was permitted to file his answer, and the cause proceeded to trial on the merits, without objection or exception, questions concerning the pleadings ruled upon by the court were afterward wholly irrelevant.—*Ellis, Adm'r, v. Lamme*, 153.
3. *Trial—Petition—Notes, treated as evidence of debt—What time given defendant to answer.*—Where the cause of action set out in the petition was for work and labor done, with a separate statement of the amount of each account, coupled in every case with reference to papers attached to the petition in the following form: "as will more fully appear by the evidence of indebtedness herewith filed"—it was immaterial to inquire whether these "evidences of indebtedness" were, in point of fact, notes for the direct payment of money or not. Plaintiff having elected to declare upon the original cause of action in this manner, defendant was entitled to six days within which to plead; and the court will, on motion at a subsequent term, the irregularity being shown to its satisfaction, set aside a judgment given for plaintiff within that time, or do whatsoever the justice of the case may require.—*Smith v. Best*, 185.
4. *City Ordinances—City Charters—How set forth in Pleading.*—Where a party asserts a right founded upon provisions of city or town ordinances, the pleading must set forth those provisions in whole or in substance. The courts cannot take judicial notice of such ordinances. But when the material allegations of an information were founded upon a city charter, and the act was pleaded by its title, the court, under section 40 of the practice act (Gen. Stat. 1865, p. 661), could take judicial notice of its provisions.—*State v. Oddle*, 210.
5. *Quo Warranto—Office of City Treasurer—Information relating to—Pleading—What Averments sufficient.*—Where, by the terms of a city charter, the corporate powers were vested in a mayor and councilmen, to be elected by the qualified voters of the city, and power was expressly given to the mayor and council to appoint a city register, collector, and such other officers as they might at any time deem necessary, the averment contained in an information claiming the office of city treasurer, that the mayor and city councilmen had been duly elected, and the relator duly appointed and qualified, was a sufficient allegation of these main facts. If there were any ordinances defining the manner of election or appointment, it would devolve upon defendant, under the pleading, to produce them, and show that either the election of the mayor and councilmen, or the appointment of the treasurer, had not been conducted in conformity therewith, when the relator had first produced sufficient *prima facie* evidence to sustain his information.—*Id.*
6. *Practice—Pleading made more definite, at whose instance—Construction of Statute.*—The provision of the practice act (Gen. Stat. 1865, chap. 165, § 20) that the court may require a pleading to be made more definite and certain, would seem to imply that it must be done on motion of the adverse party.—*Id.*
7. *Foreign Insurance Agencies—Pleading—Waiver.*—Under the first section of the act concerning foreign insurance agencies (R. C. 1855, p. 885, § 1), a corporation has the same right to remove a suit brought against it, into the courts of the United States, that any other citizen of another State would have when sued in this State. Nor did it waive this right by answering and pro-



## PRACTICE, CIVIL—(Continued.)

- ceeding to trial after such removal had been refused. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction.—*Herryford v. Aetna Insurance Company*, 148.
8. *Causes—Application for removal to U. S. Courts—Effect.*—When a corporation makes an application for a removal of the cause to the United States Circuit Court, in the manner required by the act of Congress, it is error in the State court to proceed further in the matter, and any subsequent step is *coram non judice*.—*Id.*
  9. *Statute of Insurance—Intent and Effect.*—It was not the intention of the statute of this State concerning foreign insurance agencies (R. C. 1855, p. 885, § 1, and Gen. Stat. 1865, p. 402, § 3) to preclude the party from making this application. Its proper effect is merely to make the service of process on the agent of the company in this State binding on the corporation, for the purpose of giving the court jurisdiction over the party.—*Id.*
  10. *Statute of Insurance—Foreign Agency—Process.*—This statute gives all the facilities for serving the ordinary process of law upon the foreign corporation which takes up its residence in this State, by establishing an agency here under its provisions, that would exist in reference to a corporation chartered by the legislature of this State.—*Id.*
  11. *Practice—Defenses and Counter Claims, how distinguished.*—A counter claim, as understood in the act relating to practice in civil cases (Gen. Stat. 1865, chap. 1865, §§ 12, 13), must be of the nature of a cause of action at law. Different defenses or counter claims may be separately stated in the same answer; but equitable matter—that is, an equity of relief—can constitute a defense only, but not properly a counter claim. If it be not a defense, it can not be joined in the same suit with a cause of action at law.—*Jones v. Moore*, 413.
  12. *Practice—Counter Claim; what cause of action not.*—A cause of action which wholly defeats the demand of the plaintiff cannot be a counter claim.—*Id.*
  13. *Practice—Recoupment and set-off, what.*—A recoupment or set-off is not of the nature of a defense or plea in bar, but admits the cause of action and claims an allowance in diminution of the plaintiffs' demand, and it is not a counter claim.—*Id.*
  14. *Pleadings—Motion for New Trial—Supreme Court.*—The failure of a party appellant to file his motion for new trial or in arrest of judgment, thereby giving the Circuit Court no opportunity to correct its own errors, is fatal to an application for a review of the proceedings in this court.—*Morgner v. Kister*, 466.
  15. *Practice—Demurrer—Amendment—Judgment.*—Where, upon demurrer, a petition is held insufficient as to certain defendants, and plaintiff failed to amend, such defendants are entitled to a final judgment and discharge.—*Bobbs v. Woodward*, 482.
  16. *Practice—Answer—New Matter—Failure to Reply—Testimony.*—Under the sixteenth and twenty-sixth sections of chapter 165 of the practice act (Gen. Stat. 1865, pp. 659, 661), where defendant's answer set up new matter amounting to a substantial defense, and plaintiff failed to reply thereto, such matter stood confessed and entitled defendant to judgment. He was not bound to introduce any evidence upon that point; and this court will not look to the

## PRACTICE, CIVIL—(Continued.)

- bill of exceptions for the purpose of ascertaining whether it is sustained by the proof made or not.—*Moore v. Sauborin*, 490.
17. *Administration—Set-off against suit of Administrator, when admissible.*—The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.—*Shannon's Adm'r v. Dinan*, 269.
18. *Railroad Companies—Negligence—Pleading—Counter Claim.*—Where suit was brought against a railroad company for damages in killing a horse, and the answer merely alleged that plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that, by means of that act of gross negligence on the part of the plaintiff, the animal got on the track and was run over, whereby the cars were thrown off the track and injured to the amount of five thousand dollars: *held*, that the answer contained no special defense to plaintiff's cause of action, nor a counter claim in the nature of a set-off. It was simply a counter claim in the nature of a cross action, and was properly stricken out on motion. The counter claim, as an independent cause of action arising out of the same transaction, stated no additional facts which, those in the petition being admitted, would have entitled defendant to a several judgment against plaintiff.—*Tarwater v. Hannibal and St. Joseph Railroad Company*, 193.
19. *Negligence—Pleadings—Averments.*—Whether or not a given state of facts amount to negligence, or to any proof of negligence, is a question of law. And an averment that an act was done carelessly and negligently, so far as it goes beyond a bare statement of the facts themselves, avers a matter of law only, of which the court, and not the party himself, must be the judge. Where the answer sets up as a defense the negligence of plaintiff, it should be alleged as a main fact, which might be proved by evidence of other facts and circumstances from which negligence might be inferred by a jury.—*Id.*
20. *Practice—Ejectment—Counter Claim—Specific Performance.*—Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father.—*Harris v. Vinyard*, 568.
21. *Pleading—Averments.*—Where enough appears in the body of the petition to show the object of the suit, and the real parties for whose use and benefit it was prosecuted, it substantially complies with the rules of pleading (Gen. Stat. 1865, p. 658, § 3) as recognized by the former decisions of this court.—*State, to use of Worth County, v. Patton*, 531.

## PRACTICE, CIVIL—(Continued.)

22. *Pleading—Title.*—The want of a proper statement of the parties in the caption of the petition is not fatal when it is supplied in the body of the pleading by a substantial averment showing the capacity of the plaintiff to sue and recover upon the cause of action.—*Id.*
23. *Pleading—Demurrer, objections raised by.*—The objection that plaintiff's petition does not state facts sufficient to warrant the plaintiff to sue, because his representative character is not sufficiently set out and averred, should be raised by demurrer. Otherwise, under the present system of pleading, it will be presumed to be waived. (Gen. Stat. 1865, p. 658, §§ 6, 10.)—*Weldon's Adm'r v. Hobbs*, 537.
24. *Pleading—Executorship—What averment of sufficient.*—Where, in the body of the petition, it is averred that plaintiff is the acting and lawful executor of the last will and testament of the deceased, the averment is amply good, in the absence of any objection, to sustain the cause, within the reasoning of the decision in the case of *The State to the use of Tapley's Adm'r v. Matson*, 38 Mo. 489.—*Id.*
25. *Pleading—Title.*—The description of administrator in the title may be wholly disregarded.—*Id.*
26. *Pleading—Exceptions—Answer.*—If defendant wishes to avail himself of the error committed by the court in striking out his answer, he should let judgment go at the time and stand upon his exceptions. By pleading over and going to trial upon another issue, he voluntarily abandons whatever grounds he might have had for a review of the action of the court.—*Id.*

See PRACTICE, CIVIL—ACTIONS.

## TRIALS.

1. *Instructions.*—Instructions based upon a state of facts not in evidence should not be given.—*Turner v. Baker*, 13.
2. *Instructions—Verdict—Reversal.*—The giving of such instructions, if the jury were thereby manifestly misled in their verdict, will be good ground for the reversal of the cause.—*Id.*
3. *Trial—Issues—What left to a Jury.*—The question of fact whether certain promises or assurances were fraudulently given and were the sole ground of the plaintiff's action, to his injury and loss and to the gain of the defendant, would more properly be submitted to the jury upon an issue directed to that question.—*Rutherford v. Williams*, 19.
4. *Practice—Instructions.*—The refusal by the court to pass upon instructions may be taken as a refusal to give them.—*Karriger v. Greb*, 44.
5. *Instructions—Evidence.*—There is no error in refusing to give instructions not sustained by any evidence.—*Id.*
6. *Practice—Trials—Evidence—Instructions—Error.*—If there be any competent evidence presented to support an issue, it is error in the court to instruct the jury that the party is not entitled to recover.—*Deere v. Plant*, 60.
7. *Trial—Evidence—Jury.*—Where any evidence exists tending to show facts which constitute a good defense, the case ought not to be taken from the jury.—*Benton v. Klein*, 97.
8. *Practice—Amendment—Parties—Trial.*—Where it appears at the trial that one of the parties has assigned all his interest in the matter in controversy to another, the court may amend the record and pleadings by allowing the

## PRACTICE, CIVIL—(Continued.)

- assignee to be added as a party to the record. (R. C. 1855, p. 1253, § 3.)—*Wellman v. Dismukes*, 101.
9. *Promissory Note—Verdict—Judgment.*—In an action upon a promissory note, where the answer simply denied the execution of the note, and the cause was submitted to the jury, it was their duty, under the provisions of Gen. Stat. 1865, chap. 169, §§ 21, 26, not simply to find a general verdict for plaintiff, but also to assess the amount due upon the judgment; and the court is not authorized to invade the province of the jury, and, in case of a general verdict by them, to proceed to ascertain the amount due upon the note and render judgment thereon.—*Cates v. Nickell*, 169.
10. *Trial—Motion to Correct Judgment.*—If a mere error or mistake in entering up a judgment is sought to be corrected, it can only be done by motion, filed within the proper time, and within the term at which the judgment was recorded. Such motion may, however, be continued over for cause, and determined at a subsequent term.—*Smith v. Best*, 185.
11. *Practice—Trial—Jury—When presumed to be waived.*—Where both parties to a suit are present and submit the cause to the court on the evidence, and neither of them demands a jury, it may be presumed that the right of trial by jury is waived.—*Williams v. Carpenter*, 327.
12. *Practice—Trial—Matters of Law and Equity to be tried separately.*—Where a matter of equity and an action at law are separately stated in the same petition or answer, the matter of equity and the matter of law must necessarily be separately tried or heard, for the reason that there is a constitutional right of trial by jury in the one case, and not in the other, and the nature of the judgment or relief given must in general be very different.—*Jones v. Moore*, 413.
13. *Practice—Trial—Affidavit—Admissions—Subsequent Trial.*—Plaintiff claimed certain property as purchaser at assignee's sale, and at the trial defendant obtained a continuance upon affidavit that testimony had been discovered, too late to be used in the trial, to prove that "one of the assignors" "was insolvent at the time he made the assignment, and that he made the same to hinder and delay creditors, and that the same is void;" but plaintiff elected to go into trial, and admitted the facts stated in the affidavit, and the case proceeded: *held*, that at a subsequent trial of the same cause such former admission of counsel could not be used in evidence, and the action of the court in excluding it operated no surprise to defendant, and constituted no ground for new trial. Plaintiff at most simply admitted that the statements of the affidavit were to be regarded as proved for the purposes of the previous trial. The admission was not in any sense one of record, and stood upon the same ground precisely as if the absent witness had himself been present and testified to the facts stated in the affidavit; and the fact that the admission was preserved in a bill of exceptions does not alter the case.—*Kitchen v. Reinsky*, 427.
14. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*—Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a

## PRACTICE, CIVIL—(Continued.)

- regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.—*Id.*
15. *Practice—Trial—Instructions—Evidence tending to prove an issue always submitted to a jury.*—An instruction declaring that upon the evidence a claimant cannot recover, is only justified or warranted where there is a total and complete failure of evidence to uphold a verdict. Where there is any evidence tending to prove the issue, it must be submitted to the jury.—*Claffin v. Rosenberg*, 439.
16. *Practice—Circuit Court—Jurisdiction of, when inquired into.*—The question whether the Circuit Court has jurisdiction of the cause may always be inquired into.—*Hannibal & St. Joseph R.R. Co. v. Mahoney*, 467.
17. *Practice—Trial—Partnership—Dismissal of Suit—Construction of Statute.*—Where a receiver in a partnership suit made a report showing on its face *prima facie* evidence of a full settlement of all matters in controversy between the parties, it was proper for plaintiff to dismiss his suit without proceeding further, under Gen. Stat. 1865, p. 662, § 47. Had it been manifest that the rights and interests of defendant would be prejudiced thereby, a dismissal of the case might have been erroneous, notwithstanding the above provision.—*Worthington v. White*, 462.
18. *Practice—Trial—Instructions.*—Where the instructions taken as a whole present the law of the case correctly, any objection to any one by itself, though good, will not be considered a misdirection of the jury.—*Moore v. Sauborin*, 490.
19. *Practice—Submission of Cause—Finding—Continuance.*—Where, upon the trial of a cause, the court found that plaintiff was not entitled to recover on the proof given, and, without entering judgment of record, continued the cause, such action was simply an exercise of the power of the court to grant a new trial; and this court will not review its action in granting the same.—*Simpson v. Blunt*, 542.
20. *Sureties—Notice to Sue—Waiver.*—Where the security upon a note gave the holder notice in writing to bring suit immediately, but delay was caused by defendant himself, he is presumed to have waived the requirements of the statute concerning the time within which such suits are to be brought. (Gen. Stat. 1865, p. 406, §§ 1, 2.)—*Id.*
21. *Partnership—What issues triable by the Court.*—Where the purpose of a suit was simply to establish a partnership, and to ascertain the amount of funds held by defendant in trust for the firm of which he was a member, the issues properly belong to the chancellor. Such a suit is not an action for the recovery of money only, or of specific real and personal property, as contemplated by section 12, chapter 169, Gen. Stat. 1865, and must be tried by the court.—*Hunter v. Whitehead*, 524.
22. *Practice—Ejectment—Counter Claim—Specific Performance.*—Where, in a suit of ejectment, defendant set up as a defense his purchase of the premises under a contract with plaintiff's deceased father, such answer, if true, was sufficient to defeat plaintiff's recovery. But he would not, in consequence of such finding of the issue, be entitled to a decree vesting the title in himself as against all the heirs; and that portion of his answer praying for a decree of



## PRACTICE, CIVIL—(Continued.)

title in himself should be stricken out. The issue pertinent to the case raised by the answer would be whether the land in question belonged to the plaintiff or to the estate of his deceased father.—*Harris v. Vinyard*, 568.

## PRACTICE, CRIMINAL.

1. *Indictments—Sufficiency.*—In an action for perjury, for falsely taking a certain prescribed oath, where a part only of the oath was falsely taken, the indictment need not set out the whole, but may set out merely that portion of the oath taken which contained the falsehood.—*State v. Neal*, 119.
2. *Assault to Kill—Indictment—Averments—Construction of Statute.*—An indictment alleging that defendant, "feloniously, on purpose, and willfully," etc., "did then and there make an assault with the intent him, the said," etc., "then and there to kill," etc., but omitting to charge that the offense was committed "with malice aforethought," would be fatally defective under section 29, chapter 200, Gen. Stat. 1865, but is good and sufficient within the terms and meaning of section 32 of the same chapter. That the prosecutor used some of the terms embodied in section 29, such as "on purpose, and with a deadly weapon," is not to be regarded as absolutely conclusive that the indictment can be founded on that section only. These words may be treated as mere surplusage, and there will still remain a complete and sufficient description of an offense as designated in section 32.—*State v. Seward*, 206.
3. *Criminal Law—Conspiracy—Evidence—Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the acts of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.—*State v. Louisa Daubert*, 239.
4. *Criminal Law—Conspiracy—Evidence—Order of introduction of testimony.*—Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.—*Id.*
5. *Practice, Criminal—Indictment—Motion compelling to elect.*—The practice is now well settled that a motion to compel the prosecuting attorney to elect upon which count of an indictment he will proceed is addressed to the sound discretion of the court trying the case, and the Supreme Court will not interfere with that discretion unless it is apparent that it has been exercised oppressively or to the manifest injury of the accused. Where the offense charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and whenever there is a legal joinder, the court may exercise its discretion as to an election.—*State v. Henry Daubert*, 242.
6. *Practice, Criminal—Indictment—Nolle Prosequi.*—Where two defendants were jointly charged, in the same indictment, on two counts: 1, for larceny,

## PRACTICE, CRIMINAL—(Continued.)

and 2, for receiving stolen goods, it was error to permit the circuit attorney to enter a *nolle prosequi* against one defendant upon the first count, and against the other upon the second. The two remaining counts really constituted two indictments, requiring different kinds of proof and separate and independent verdicts.—*Id.*

7. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible—* Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.—*Id.*

8. *Practice, Criminal—Evidence—Verdict.*—If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.—*Id.*

9. *Practice, Criminal—St. Louis Court of Criminal Correction—Indictment—Information.*—Under the act creating it (Sess. Acts 1868, p. 269), the St. Louis Court of Criminal Correction could properly proceed upon information against persons charged with any of the offenses named in section 8, chapter 206, Gen. Stat. 1865, when committed within its proper jurisdiction. By that section such offenses are in terms made misdemeanors, and are therefore subject to an information, notwithstanding the provisions of section 24, article 1, of the Constitution of Missouri. Misdemeanors were not intended to be embraced in the words "indictable offenses," as used in that section, but only felonies.—*State v. Berlin*, 572.

10. *Witnesses—Husband and Wife—Information.*—The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also make her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.—*Id.*

11. *Practice, Criminal—Indictment—Appeal, without Final Judgment.*—Where the record simply shows that the court below quashed an indictment, but no final judgment was rendered, nor was the defendant discharged, no appeal will lie from the action of the court.—*State v. Smith*, 550

See CRIMINAL LAW. PRACTICE—SUPREME COURT, 2.

## PRACTICE, SUPREME COURT.

1. *Supreme Court—Instructions—Evidence.*—It is not the province of the Supreme Court to determine the force or effect of conflicting testimony. But it may consider what the evidence on either side tended to prove, and what not. Instructions should be given or rejected upon the case made by the evidence. Theoretical propositions, for which there is no proper foundation in the evidence, or which suppose a different state of the case from that which is proved, should not be given, for they directly tend to mislead the jury.—*McKeon v. Citizens' Railroad Company*, 79.

2. *Practice, Criminal—Appeals—Neglect to file statements, etc., how treated.*—In appeals from the Criminal Court, where no statement or briefs are filed, the case will be dismissed. In these cases the Supreme Court is governed by the practice in civil cases, and not by the act concerning criminal practice.—*State v. Hunter*, 238.

## PRACTICE, SUPREME COURT—(Continued.)

3. *Pleadings—Motion for New Trial—Supreme Court.*—The failure of a party appellant to file his motion for new trial or in arrest of judgment, thereby giving the Circuit Court no opportunity to correct its own errors, is fatal to an application for a review of the proceedings in this court.—*Morgner v. Kister*, 466.

## PRINCIPAL AND AGENT.

See AGENCY.

## PROHIBITION, WRIT OF.

1. *County Courts—Repairs of County Buildings—Prohibitions.*—The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. (Gen. Stat. 1865, ch. 36, and ch. 137.) These matters belong to the administrative and ministerial functions of the County Court, and not to the judicial branch of their jurisdiction. And for this reason it has been decided that even a prohibition will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. Even where a court of equity has jurisdiction to grant an injunction to restrain proceedings at law, it is never granted directly against a court, like a prohibition, but only against the persons who are parties to such proceedings, without impeaching the jurisdiction of the court itself.—*Vitt v. Owens*, 512.
2. *County Courts—Repairs of County Buildings—Mandamus—Injunction.*—Although, in proceedings touching repairs of county buildings by the County Court, where there is no appeal or writ of error, the Circuit Courts have a superintending control which may be exercised in certain cases and in a proper way, according to the usages and principles of law, yet when the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, a writ of mandamus will not lie from the Circuit Court to the County Court to stay such proceedings; and in such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law. And a petition being filed in this court praying that a prohibition issue to stay further proceedings in the matter of such injunction, the prohibition will be granted, and the injunction proceedings will be treated as a nullity.—*Id.*
3. *Collections—Settlement of Accounts—Notice.*—The statute concerning the settlement of claims and accounts by collectors of revenue (Gen. Stat. 1865, p. 87, §§ 16, 19) is sufficient notice to the collector of the authority of the auditor to adjust his (the collector's) accounts and strike a balance, when he fails to exhibit them within the required time.—*Casby v. Thompson*, 133.
4. *Auditors—Writs of Prohibition.*—The duties of an auditor in proceeding against defaulting collectors, under such circumstances, are executive and ministerial, and not judicial; and, under the rule laid down in the case of *The State ex rel. West v. Clark* County Court (41 Mo. 44), a writ of prohibition against him will not lie.—*Id.*
5. *Writs of Prohibition—Meaning of Phrase as used in the Statute.*—The words "writ of prohibition," occurring in the act concerning injunctions (Gen. Stat. 1865, chap. 167, § 24), are used in the general sense of a restraint by injunction, and not in their technical sense.—*Id.*

## PROHIBITION, WRIT OF—(Continued.)

6. *Clerk—Authority.*—The clerk of a Circuit Court, in vacation, has no power to issue a writ of prohibition.—*Id.*

## PUBLIC PRINTER.

1. *Public Printer—Appendix—Price allowed.*—Under the twenty-first section of the act concerning the public printer (Gen. Stat. 1865, p. 148), the appendix to the journal of either house of the General Assembly constitutes a part of the journal; and although the greater part of the reports and public documents incorporated in the appendix by virtue of that section had already been printed in the journal, under the order of the two houses, or in pursuance of a law of the State requiring it to be done, yet the public printer would be entitled to charge separately for it, at the prices regulated by law. (State ex rel. Dyer v. Thompson, 41 Mo. 240, affirmed.)—State ex rel. Foster v. Rodman, 176.

## R

## RAILROADS.

1. *Railroads—County Court—Subscription—Election—Construction of Statute.*—The power given by section six of the act to incorporate the Platte City and Fort Des Moines Railroad Company (Adj. Sess. Acts 1859-60, p. 443), to the County Court of Platte county, to subscribe capital stock to said company, is, by section eight of the same act, made subject to the general railroad law. (R. C. 1855, p. 427, § 30.) And the true meaning and effect of this law is, that an election to ascertain the sense of the tax-payers as to such subscription is a necessary condition of the power to subscribe. A subscription made without such election was without authority of law, and void.—Leavenworth and Des Moines Railroad Company v. County Court of Platte County, 171.
2. *Railroad Companies—Negligence—Pleading—Counter Claim.*—Where suit was brought against a railroad company for damages in killing a horse, and the answer merely alleged that plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that, by means of that act of gross negligence on the part of the plaintiff, the animal got on the track and was run over, whereby the cars were thrown off the track and injured to the amount of \$5,000: *held*, that the answer contained no special defense to plaintiff's cause of action, nor a counter claim in the nature of a set-off. It was simply a counter-claim in the nature of a cross action, and was properly stricken out on motion. The counter claim, as an independent cause of action arising out of the same transaction, stated no additional facts which, those in the petition being admitted, would have entitled defendant to a several judgment against plaintiff.—Tarwater v. Hannibal and St. Joseph Railroad Company, 193.
3. *Railroad Companies—Stock—Uninclosed Lands.*—Under the decisions of this court, plaintiff had the lawful right to turn out his horse upon the uninclosed lands adjoining the railroad.—*Id.*
4. *Negligence—Pleadings—Averments.*—Whether or not a given state of facts amount to negligence, or to any proof of negligence, is a question of law. And an averment that an act was done carelessly and negligently, so far as it goes beyond a bare statement of the facts themselves, avers a matter of law only, of which the court, and not the party himself, must be the judge.

## RAILROADS—(Continued.)

Where the answer sets up as a defense the negligence of plaintiff, it should be alleged as a main fact, which might be proved by evidence of other facts and circumstances from which negligence might be inferred by a jury.—*Id.*

5. *Railroad Companies—Liability—Accident.*—Railroad companies may be liable in these cases for unavoidable accidents or simple misadventure, but the owner of cattle in such case would not be liable; but otherwise, where one willfully drives cattle upon a railroad track.—*Id.*
6. Decision in case of *Tarwater v. Hannibal and St. Joseph Railroad Company (ante)* affirmed.—*Vickers v. Hannibal & St. Joseph R.R. Co.*, 198.
7. *Corporations—Railroad Companies—Eminent Domain, when granted.*—Where the legislature, in the exercise of its discretion, delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. If, by the terms of its charter, it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation both for passengers and freight, commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its road-bed was a rightful exercise of legislative discretion.—*Dietrich v. Murdock*, 279.
8. *Corporations—Railroad Companies—Lands—Permission to occupy—Effect of.*—Whether the proceedings of the railroad corporation were sufficient to divest the title of the owner of the land upon which the road was located, or whether he thereby had any notice of an intention on the part of the company to take any portion of his land, is immaterial, if for a number of years after the initiatory steps taken for the location and construction of the road there was no attempt on his part to prevent the execution of the work. In such case it must be assumed that the occupation of his land by the company for the purpose to which it was applied was assented to by him. Being thus permitted to occupy the land, the law would protect the company in the enjoyment of any property used in connection with such occupation, and, if compelled to leave the premises by proper proceedings, would permit such property to be removed.—*Id.*
9. *Railroad Companies—Consolidation.*—Where several railroad companies were, by virtue of the act of union, "merged in and constituted one body corporate," under the name of one of them, and all were continued in existence, it was treated as a consolidation.—*Powell v. North Mo. R.R. Co.*, 63.
10. *Railroad Companies—Amalgamation.*—An amalgamation implies such a consolidation as to reduce the companies to a common interest. But where, by the very terms of the statute and the deed, the first corporation was extinguished, and the second only continued to exist, the case is not one of mere consolidation or amalgamation.—*Id.*

See CONTRACTS, 2. CARRIERS.

## RAILROADS, STREET.

1. *Street Railroads—Statute—Construction.*—The effect and intention of the act concerning street railroads, approved January 16, 1860, is that, when



## RAILROADS, STREET—(Continued.)

the injury of the passenger is occasioned by his getting on or off the car at the forward platform, it shall be presumed as a matter of law that the negligence to the passenger himself contributed to produce the injury.—*McKeon v. Citizens' R. R. Co.*, 80.

2. *Railroad Companies—Responsibility.*—Street-railroad companies are not responsible for the crimes of an employee; nor liable for his acts of willful and malicious trespass. They are only answerable for his negligence, or incapacity, or unskillfulness, in the performance of the duties assigned to him.—*Id.*

## REGISTRATION.

1. *Registration of Voters—Appointment of Registers.*—Under the second section of the act to provide for the registration of voters (Gen. Stat. 1865, p. 905), the registers in the election districts appointed in July, 1866, hold for two years; and when the new county supervisor of registration was elected in November, 1866, the appointment of new registers did not devolve upon him.—*State ex rel. Shields v. Smith*, 506.

## REPLEVIN.

See TRUSTS, 2.

## REVENUE.

1. *Collections—Settlement of Accounts—Notice.*—The statute concerning the settlement of claims and accounts by collectors of revenue (Gen. Stat. 1865, p. 87, §§ 16, 19) is sufficient notice to the collector of the authority of the auditor to adjust his (the collector's) accounts and strike a balance, when he fails to exhibit them within the required time.—*Casby v. Thompson*, 133.
2. *Auditors—Writs of Prohibition.*—The duties of an auditor in proceeding against defaulting collectors, under such circumstances, are executive and ministerial, and not judicial; and, under the rule laid down in the case of *The State ex rel. West v. Clark County Court* (41 Mo. 44), a writ of prohibition against him will not lie.—*Id.*
3. *Writs of Prohibition—Meaning of Phrase as used in the Statute.*—The words "writ of prohibition," occurring in the act concerning injunctions (Gen. Stat. 1865, chap. 167, § 24), are used in the general sense of a restraint by injunction, and not in their technical sense.—*Id.*
4. *Clerk—Authority.*—The clerk of a Circuit Court, in vacation, has no power to issue a writ of prohibition.—*Id.*
5. *Legislature—Powers—Tax Deeds.*—The legislature may make the deed of a public officer *prima facie* evidence of title; but they cannot make it conclusive evidence as to matters which are vitally essential to any valid exercise whatever of the taxing power.—*Abbott v. Lindenbower*, 162.
6. *Tax Title—Ejectment—Evidence.*—In an action of ejectment upon a tax title, notwithstanding the prohibitions of the act touching tax deeds (Adj. Sess. Acts 1863-4, p. 89, §§ 21, 22; Gen. Stat. 1865, p. 127, §§ 111, 112), evidence was admissible for the purpose of showing that the land had not been assessed in the name of the real owner, or of any former owner, or of any tenant or occupant of the land.—*Id.*
7. *Tax Deeds—Proceedings under, against persons not owners, would have what effect.*—A deed conveying the title under proceedings against a person

## REVENUE—(Continued.)

- who had no title or interest whatever in the land, and was in no manner the representative of the owner, if any title could pass, would have the effect to take the property of one man, without due process of law against him, and give it to another. (Rev. Act, art. 2, §§ 10 and 29; Adj. Sess. Acts 1863-4—Gen. Stat. 1865, p. 100, § 13, p. 104, § 39—cited and compared.)—*Id.*
8. *False assessments void.*—An assessment in the name of a person who neither was nor ever had been the owner of the property, would be an utterly void assessment, and as against the owner of property cannot be made the foundation of a sale and conveyance of his land, even by legislative enactment.—*Id.*
9. *Tax Deeds, conclusive evidence of what.*—The assessment of land, and the delivery of tax-books, and collection of taxes, and return of delinquent tax-lists, in the particular time and manner required by law; the assessment of all the land in the county; the issue of precept for the sale of land; the sale of land at the court-house door, and in the smallest subdivisions, are not essential pre-requisites of the lawful exercise of the taxing power in the State; and the act concerning tax deeds cannot be declared unconstitutional, because it makes the deed conclusive evidence that these things had been rightly done. They were matters of form which could be taken against defendant by default.—*Id.*
10. *Statute—Construction.*—The clause (Adj. Sess. Acts 1863-4, p. 89, § 21; Gen. Stat. 1865, p. 127, § 111) which provides that the tax deed "shall vest in the grantee, his heirs and assigns, the title to the real estate therein described," may be understood as declaring what shall be the effect of the instrument when it has any effect at all.—*Id.*
11. *Laws exempting Lands from Taxation—Their effect.*—An act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent legislature.—*Washington University v. Rowse*, 308.
12. *Legislature—What Laws irrevocable; what not—U. S. Constitution—Construction.*—Each legislature is alike invested with the general powers of sovereignty. Therefore one cannot pass a law irrevocable or irrevocable in its character unless it has imparted to it something in the nature of a compact or contract which will preserve it inviolate under the inhibition of the national constitution.—*Id.*
13. *Taxation—Laws depriving Legislature of power of; how construed.*—A law which seeks to deprive the legislature of the power of taxation must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding. Every presumption will be made against its surrender, as the power was committed by the people to be exercised, and not alienated.—*Id.*
14. *Corporations—Laws exempting from taxation—Their effect.*—The legislature may, if there is no prohibition in the organic law to the contrary, exempt a corporation from taxation, but such exemption is in its nature *durante bene placito*, and revocable by a subsequent act.—*Id.*
15. *Right of Taxation—Incident of popular sovereignty—Implied Powers.*—In a representative democracy, the right of taxing the citizen is an inseparable

## REVENUE—(Continued.)

incident of popular sovereignty, and must be preserved unimpaired in order that the revenue and burdens necessary to support the government be not unequally distributed, or onerously imposed on any particular class. It is a branch of the legislative power, which always, in its nature, implies not only the power of making laws, but of altering and repealing them, as the exigencies of the State and circumstances of the times may require.—*Id.*

16. Case of Washington University v. Rowse (*ante*, p. 308) affirmed.—Home of the Friendless v. Rowse, 361.
17. *Revenue — Taxation — Property occupied by the National Government, when exempt.*—Property occupied by the national government will not be exempt from State taxation unless the title and ownership thereof be vested in the United States. Taxes are assessed against the real owner without any regard to temporary occupancy, and the obligation of payment follows the assessment.—Speed v. St. Louis County Court, 382.
18. *Revenue Act — Construction.*—Sections 19 and 20 of the revenue act of 1863 (Adj. Sess. Acts 1863, p. 69) contemplate an assessment on shares of stock held and owned by individual persons.—St. Louis Building and Savings Association v. Lightner, 421.
19. *Revenue Act — Design.*—The manifest object of these provisions was that the assessor might be thus provided with authentic information as to the persons who owned shares of stock in the corporation, in order that the shares might be properly assessed against them.—*Id.*
20. *Corporation — Capital Stock — Taxation.*—That portion of the capital stock of a corporation which has been invested in bonds of the United States is not subject to taxation by the State.—*Id.*

## S

## SET-OFF.

See ADMINISTRATION, 4. SURETIES, 7.

## SHERIFF.

1. *Sheriff's Deed — Recitals.*—Where the plaintiff is bound to produce a judgment, the recitals in the deed under which he claims should conform to the judgment, in order that the court can see that the deed was made on the judgment.—Carpenter v. King, 219.
2. *Sheriff's Deed — Recitals — What, prima facie Evidence.*—A sheriff's deed which recites the date of the rendition of the judgment, the amount for which it was rendered, the names of the parties to the record, the time of filing the transcript, and the time when execution was issued, is sufficiently definite to render it *prima facie* evidence and shift the burden of proof upon the adverse party, if he denies its validity, even if it does not recite the name of the justice of the peace before whom it was rendered. Such recitals contained every material fact required by the statute relating to executions.—*Id.*
3. *Sheriff's Deed, presumptive evidence of its recitals — Burden of Proof.*—The sheriff's deed is presumptive evidence of the recitals contained in it, without any accompanying proofs; subject, however, to be destroyed or invalidated when attacked by a party resisting it. (McCormick v. Fitzmorris *et al.*, 39 Mo. 24, affirmed.)—*Id.*

## SHERIFF—(Continued.)

4. *Practice—Attachment—Sheriff's Return—Amendment, when permitted.*—

Under the laws of this State, an amendment of a sheriff's return upon a writ of attachment may be allowed after judgment and without notice, and it will not be questioned in the absence of anything tending to show an improper exercise of the discretion of the court; and the effect of such amendment will be to give the party holding by virtue of the attachment the benefit of a regular and valid service of the writ at the time of the original levy, and to make the title which passed by the conveyance of the property under the attachment sale relate back to that sale.—*Kitchen v. Reinsky*, 427.

## ST. LOUIS, CITY OF.

1. *Water Commissioners—Water Licenses—Actions touching—Constitution—*

*Statute—Subject Matter, how far must be embraced in title—Construction of § 32, art. 4, Const. Mo.*—An act entitled "An act amendatory of an act to enable the city of St. Louis to procure a supply of wholesome water, approved March 13, 1867" (Adj. Sess. Acts Mo. 1868, p. 291), after authorizing the Board of Water Commissioners to require owners, etc., of buildings to take out water-licenses, goes on to provide, in substance, that parties who fail or neglect to comply with the provisions of the section shall be subject to the same penalties as the parties who use the water of the city and fail or refuse to pay the rate or assessment for the same; *provided, however*, that the Board of Health shall, in the first instance, declare by resolution that in its judgment the use of water from the city water-works in the houses of such parties is demanded as a sanitary measure for the preservation of the health of the inmates: *Held*, that the section, although it confers extraordinary powers, relates clearly to the subject intimated in the title, and is entirely congruous and connected with it, and is valid under section 32 of article 4 of the constitution of this State. The only intention of that section of the constitution was to prevent the conjoining in the same act of incongruous matters, and of subjects having no legitimate connection or relation to each other; and if the title of an original act is sufficient to embrace the provisions contained in an amendatory act, it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. It is plain, however, that the use of the words "other purposes," which have been extensively used in the title to acts to cover any and every thing, whether connected with the main question indicated by the title or not, can no longer be of any avail.—*City of St. Louis v. Tiefel*, 578.

2. *Police Court—Jurisdiction—Actions touching Water Licenses.*—The St.

Louis Police Court, being by the act establishing it limited to cases in which a justice of the peace would have had jurisdiction, or to those for violation of a city ordinance, or to cases of assault and battery, can have no jurisdiction over a complaint for violation of an act of the legislature in failing to take out a water-license; and, upon appeal to the Criminal Court, the case, upon motion, was properly dismissed for want of jurisdiction.—*Id.*

## STATUTE, CONSTRUCTION OF.

See ADMINISTRATION, 6. ATTACHMENT, 2. AUDITOR, COUNTY, 2. COURTS, COUNTY, 1, 2, 3. DAMAGES, 1. EVIDENCE, 4, 16. EXECUTIONS, 1, 2, 3, 4. FRAUDULENT CONVEYANCES, 4. HUSBAND AND WIFE, 7, 8. JURISDICTION, 3. JUSTICES' COURTS, 1. LAND TITLES, 2, 10, 11, 12, 13. LAND-

## STATUTE, CONSTRUCTION OF—(Continued.)

LORD AND TENANT, 4, 8. PRACTICE, CIVIL, 1—ACTIONS, 7, 10, 17—APPEALS, 9—PARTIES, 4—PLEADINGS, 1, 4, 7, 9, 11, 17—TRIALS, 9, 17. PRACTICE, CRIMINAL, 2. PUBLIC PRINTER. RAILROADS, 1. REGISTRATION. REVENUE, 1, 3, 6, 7, 10, 18. ST. LOUIS, CITY OF, 1. SURETIES, 5, 3, 7. TRESPASSES, 1. TRUSTS, 6.

## SURETIES.

1. *Co-sureties—Risks assumed.*—It may be said, as a general rule, that co-sureties undertake to assume the same risks and responsibilities, and neither can gain any advantage over another, but all subject themselves to the same liabilities.—*Seely's Adm'r v. Beck*, 143.
2. *Sureties—Rights.*—Sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify themselves; and courts of equity hold them entitled, upon payment of the debt due by their principals to the creditor, to have the full benefit of all the collateral securities held by the creditor.—*Id.*
3. *Co-securities—Agents.*—Where A. and B. were co-securities on the bond of an administrator who became insolvent, and A., as security, was compelled to pay the amount in default, the fact that prior to the execution of the bond B. had entered into an agreement with the administrator to act as his agent in receiving and paying out moneys belonging to the estate of the deceased, in consideration of the payment to him of a portion of the commissions allowed the administrator by court, does not deprive B. of his position as surety and render him liable to A. as principal on the bond. That he was entitled by law primarily to administer, and waived his rights in favor of a public administrator, or that he had an interest in the estate, will not alter the case.—*Id.*
4. *Agent—Partner.*—Under such circumstances, B. would be liable only upon the assumption that the agreement created a partnership between himself and the administrator, and no partnership can exist in the office of administrator.—*Id.*
5. *Sureties—Notice to Sue—Waiver.*—Where the security upon a note gave the holder notice in writing to bring suit immediately, but delay was caused by defendant himself, he is presumed to have waived the requirements of the statute concerning the time within which such suits are to be brought. (Gen. Stat. 1865, p. 406, §§ 1, 2.)—*Simpson v. Blant*, 542.
6. *Probate Court—Appeals—Bonds—Judgment against Securities.*—The provision of the statute in regard to appeals from justices of the peace, giving the court power to render judgment against the securities in the appeal bond (Gen. Stat. 1865, chap. 185, § 23), extends no further than appeals from justices' courts, and does not apply to appeals from the Probate Court.—*Dubois' Adm'r v. Walsh*, 273.
7. *Administration—Set-off against suit of Administrator, when admissible.*—The second section of the act regulating set-offs (R. C. 1855, p. 1462; Gen. Stat. 1865, p. 602, § 3) was only designed to be applicable in cases where the suit was brought by the executor or administrator directly against a person who had a cause of action which accrued in the lifetime of the testator or intestate. And after the death of the party having such set-off, a claim against the principal and securities upon his executor's bond, founded upon the mis-



## SURETIES—(Continued.)

conduct of the executor, is a claim against them in their individual capacity. Hence, an indebtedness of plaintiff, in his lifetime, to defendant's testator, cannot be set off against it.—*Shannon's Adm'r v. Dinan*, 225.

## T

## TRESPASSES.

1. *Trespasses—Act concerning, contemplates what.*—The act concerning trespasses (Gen. Stat. 1865, ch. 76, § 1) contemplates voluntary or willful trespasses only, which are committed without any lawful right, and it inflicts penalties as upon a wrong-doer.—*Schmidt v. Densmore*, 225.
2. *Practice—Trespass—Action of, when brought—Construction of Statute.*—The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened. Section 3, chap. 163, p. 653, Gen. Stat. 1865, does not apply to actions of that description, but contemplates those where the suit was in the nature of a proceeding *in rem* affecting the land itself.—*Hannibal & St. Joseph R.R. Co. v. Mahoney*, 467.

## TRIAL.

See PRACTICE, CIVIL—TRIAL. PRACTICE, CRIMINAL.

## TRUSTS.

1. *Husband and Wife—Marriage Settlements—How affected by debts of Husband, at law and in equity.*—The doctrines of equity touching settlements of money or property in trust for the sole and separate use of the wife relate purely to property that belongs to the wife before marriage, or which may have been given or bequeathed to her after marriage, and expressly settled to her sole and separate use by the creation of a trust for that purpose. In such case a proper instrument, based upon a valuable consideration, to the effect that she may carry on a separate trade on her sole account in the name of her trustees, may be protected at law and may be enforced in equity, for the benefit of her husband, against him and his creditors; but a voluntary agreement of this kind will not be good against his creditors. And neither law nor equity will permit an insolvent person, in the absence of any instrument like that mentioned, to carry on his own trade, with his own money, or with moneys that were donated by himself, in the name and under the cover of being his wife's trustee, for their common advantage.—*Pawley v. Vogel*, 291.
2. *Practice—Replevin—Trusts not recognized by action of.*—In a joint action of husband and wife upon claim for delivery of personal property, the court can take no cognizance of trusts or, of the equities of the wife.—*Id.*
3. *Husband and Wife—Wife's Trust Estate—What Proceedings to protect against Husband's Creditors.*—If a trust can be maintained in equity in favor of the wife against her husband's creditors, the proper remedy would be a proceeding in equity on her behalf to establish the settlement and to obtain a perpetual injunction restraining a sale of the property under a judgment at law against him.—*Id.*
4. *Fraudulent Sales—Proceeds.*—Where a fraudulent grantee of lands, which would have been subject to a trust in his hands, has sold the lands and converted them into money, the proceeds of the sale will be considered in equity

## TRUSTS—(Continued.)

as a substitution for the original property, and be subjected to the same trust.—*Rutherford v. Williams*, 18.

5. *Equity—Relief—How administered.*—Where there is any fraud touching property, courts of equity will interfere and administer a wholesome justice in favor of innocent persons who are sufferers by the fraud, without fault on their side, by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien.—*Id.*
6. *Execution—What Estates Vendible—Mere Trusts in Equity not Vendible.* The statute (R. C. 1855, pp. 740, 753, §§ 17, 73) contemplates an interest or estate in the land, of which the defendant or the trustee for his use is seized in law or equity; and where there is no seizin of such an equitable estate there is no interest in the land which is liable to execution. There must be an interest in the land which a court of law can protect or enforce, in order that it may be subject to the lien of a judgment and execution; but a mere equity, unaccompanied by possession, is not such an interest. When the *cestui que trust* has no seizin or possession of the land, no power to dispose of any estate in the land, or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for a conveyance to himself, he has no estate in law or equity which could pass under sheriff's sale.—*McIlvaine v. Smith*, 45.
7. *Equity—Debtor and Creditor—Creditor's Bills—Equitable Interest—Trusts.*—A party cannot tie up his own property, under a trust, in such manner that he may be enabled to enjoy the income thereof and set his creditors at defiance. This the law does not allow. A man can not own property or money and not own it at the same time. He cannot be permitted to have the beneficial enjoyment of an income of such a nature, beyond the reach of his honest debts. The proper remedy in such a case is a bill by the judgment creditor to have the rents and profits, as they accrue, applied in equity to the satisfaction of the debt, as far as they will go, and the powers of a court of equity are ample to make the remedy effectual. The trustee may be enjoined from paying over the income to the judgment debtor, and be directed to pay it over in satisfaction of such decree as may be rendered.—*Id.*
8. *Frauds—Resulting Trusts.*—A party who has acquired property or gained an advantage by means of his fraudulent acts should be declared a trustee for the benefit of him who is injured by such fraud.—*Rutherford v. Williams*, 18.
9. *Partition—Secret Trusts—Equitable Liens.*—In partition sales of property held by tenants in common, the amount due from one tenant to the others for rents and profits may be an equitable lien on the interest of the party receiving such rents. But this principle has no application to a case where the owners had no legal title to the property, and their right was a secret trust raised by implication to a certain proportion of the estate. When trust money is used by a party intrusted with it in purchasing real estate in his own name, courts of equity will follow the money into the land and raise a trust for him whose money is thus used. But they will not create a lien upon the property for the same or other money used by the trustee. The doctrine of constructive liens will not at this day be applied to cases not within established rules. Secret trusts in and constructive liens upon real estate are now discouraged.—*White v. Drew*, 561.

## TRUSTS—(Continued.)

10. *Partition—Trust Estates, Dower in.*—The dower of a wife is clearly limited to the property of her husband, and cannot extend to property held by him in trust for others, whether she had notice of the trust or not.—*Id.*
11. *Garnishment—Trustees—Rents.*—Where one, as agent, collected rents for the trustee of another, and was garnisheed as debtor of the beneficiary, according to the decision of this court, in the case of *McIlvaine v. Smith* (*ante*, p. 45), these rents were a trust fund in the hands of the trustee until paid over by him to the beneficiary; and the agent could not be made liable, under this process, as debtor of the beneficiary, for rents collected as the agent of the trustee.—*McIlvaine v. Lancaster, Garn.*, 96.
12. *Corporation—Dissolution—Effects—Equity.*—Although, by the old common law, the dissolution of a corporation extinguished its debts, yet courts of equity, in such case, will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come.—*Powell v. North Missouri Railroad Company*, 63.
13. *Equity—Purchaser—Fraud—Relief.*—It is a well-settled principle of equity law that where one becomes a purchaser, under such circumstances as would make it a fraud to permit him to hold on to his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtain it at a sacrifice, the court will relieve against such fraud; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby.—*McNew v. Booth*, 189.
14. *Equity—Payment—Reasonable Time.*—Where, in case of property sold under a deed of trust, the debtor party is promised a reconveyance thereof upon payment of the money owing under the deed within a reasonable time, special circumstances, the situation of the parties, and the character of the property, must be taken into account in affixing the standard. Where a person became possessed of property in such a way that the law would have held him a trustee, the lapse of time would make no difference.—*Id.*  
See CORPORATIONS, 5.

## U

## USURY.

See EQUITY, 5. INTEREST, 2.

## V

## VENDOR AND PURCHASER.

See CONVEYANCES. EVIDENCE. FRAUDULENT CONVEYANCES, 4. LAND TITLES. LEASE. MORTGAGES AND DEEDS OF TRUST.

## VERDICT.

See CRIMINAL LAW, 10. PRACTICE, CIVIL—TRIALS, 9 19. PRACTICE, CRIMINAL, 8.

## W

## WITNESSES.

1. *Witnesses—Deed of Trust—Testimony of Maker—Incompetency of, under Statute.*—Under the second subdivision of section six of the act concerning witnesses (R. C. 1855, p. 1578), testimony of the maker of a deed of trust, tending to show that the amount of his indebtedness to the beneficiaries in the deed was not correctly set out, or that a large portion of it was the amount of an order for goods never delivered to him, and that, by the advice and direction of the parties for whose benefit the deeds were executed, this sum was falsely stated for the purpose of deterring his other creditors from proceeding against his property, was incompetent.—*Byrne v. Becker*, 264.
2. *Written Instrument—Ambiguity—Parol Evidence.*—Where the matter is uncertain, on the face of the instrument, whether it was designed to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity and to aid in the interpretation.—*Musser v. Johnson*, 74.
3. *Actions—Malicious Prosecutions—Declarations.*—In such actions, declarations of the defendant to show that he was not actuated by malice in commencing the prosecution are inadmissible.—*Moore v. Sauborin*, 490.
4. *Fraud—Evidence.*—In the investigation of questions of fraud, all inquiries relating to the existence of the debt secured by a mortgage, the relations of the parties, and the circumstances connected directly with the execution of the instrument itself, are proper.—*Hubble v. Vaughan*, 138.
5. *Witnesses—Married Women—Agency—Construction of Statute.*—In order to qualify a married woman as a witness under the statute (Gen. Stat. 1865, p. 287, § 5), it must appear that she conducted the business or transaction about which she was testifying.—*Hardy v. Matthews*, 406.
6. *Criminal Law—Conspiracy—Evidence—Acts and Declaration of Co-conspirators.*—Wherever persons league themselves together for the perpetration of crime, when once the conspiracy or combination is established, the acts or declarations of one conspirator in the prosecution of the enterprise are considered the acts of all, and are evidence against all. And the rule is not limited to cases of conspiracy, but is a general one, applicable in a variety of cases, in all the departments of law, civil and criminal. But the conspiracy or combination must be shown before the confession or other acts and declarations of one defendant can be received against another; and it is for the court to determine when the evidence of combination is sufficient for this purpose.—*State v. Louisa Daubert*, 239.
7. *Criminal Law—Conspiracy—Evidence—Order of introduction of testimony.*—Other distinct proofs of guilt may be introduced in the first instance, the prosecutor undertaking to afterward lay the proper foundation therefor and bring the combination or conspiracy home to the defendant. But this latitude of admitting the evidence out of the regular order should be allowed with great circumspection and caution.—*Id.*
8. *Practice, Criminal—Indictment—Larceny—Evidence, what admissible.*—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. But where

## WITNESSES—(Continued.)

- the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense.—*State v. Henry Daubert*, 242.
9. *Practice, Criminal—Evidence—Verdict.*—If there is no evidence tending to show the commission of a crime, or it is plainly insufficient to justify a verdict of guilty, it is the duty of the court to so declare.—*Id.*
  10. *Witnesses—Husband and Wife—Information.*—The rule of law which would prohibit the wife from testifying in a criminal trial, either for or against her husband, will also render her incompetent to make and swear to a complaint against him in the St. Louis Court of Criminal Correction.—*State v. Berlin*, 572.
  11. *Practice—Trials—Evidence—Instructions—Error.*—If there be any competent evidence presented to support an issue, it is error in the court to instruct the jury that the party is not entitled to recover.—*Deere v. Plant*, 60.
  12. *Trial—Evidence—Jury.*—Where any evidence exists tending to show facts which constitute a good defense, the case ought not to be taken from the jury.—*Benton v. Klein*, 97.
  13. *Practice—Trial—Instructions—Evidence tending to prove an issue always submitted to a jury.*—An instruction declaring that upon the evidence a claimant cannot recover, is only justified or warranted where there is a total and complete failure of evidence to uphold a verdict. Where there is any evidence tending to prove the issue, it must be submitted to the jury.—*Claffin v. Rosenberg*, 439.
- See EVIDENCE, 4. PRACTICE—PLEADING, 1, 6.

## A D D E N D A .

## DAMAGES—(Continued.)

1. *Contracts—Stipulations—Penalties—Liquidated Damages.*—Plaintiff made an agreement in writing with defendant, concerning the sale of certain lands, by the terms of which nine thousand dollars of purchase money was to be paid at a day and place named, and two notes to be given in the sum of six thousand dollars each, payable in one and two years from date—payment of the notes to be secured by deed of trust on the land. On the payment of the purchase money and the execution of the notes and deed of trust, plaintiff was to give defendant a warranty deed for the property. The agreement further stipulated that "either party failing to comply with its provisions shall forfeit and pay to the other the sum of two thousand dollars." *Held*, that this stipulation should be treated as one for liquidated damages, and not one for a penalty.—*Morse v. Rathburn*, 594.
2. *Contracts—Stipulations—Liquidated Damages.*—Where the parties have agreed that, in case one of them shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conven-



**DAMAGES—***(Continued.)*

tional amount of damages sustained by such omission, courts will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages; *provided*, that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury.—*Id.*

3. *Contracts—Stipulations—Penalties—Liquidated Damages.*—When an agreement contains several distinct covenants on which there may be diverse breaches, some of an uncertain nature and others certain, with one entire sum to be paid on breach of performance, then the contract will be treated as one for a penalty, and not for liquidated damages. But where the parties to a contract, in which the damages to be ascertained growing out of it are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, in language plainly expressive of such agreement, and when the intention is plain and palpable, there is no law to justify the courts in giving the contract a different construction.—*Id.*

